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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1972

No.

DR. THEODOR E. BRATRUD,

Petitioner,

vs.

FRANK J. DUNNING, as Trustee of the Estate of Maryvale Community Hospital, debtor in Chapter X reorganization,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Dr. Theodor E. Bratrud, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, in the above entitled case on February 11, 1972, Rehearing En Banc, denied April 26, 1972.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and

Judgment of the Referee in Bankruptcy are unreported and are printed in Appendix 4 hereto, infra pages A23-A26, inclusive. The Opinion, Order and Judgment of the District Court, rejecting in part and modifying the Referee, are unreported, and are printed in Appendix 4 hereto, infra pages A14-A20, inclusive. The opinion of the Court of Appeals is reported in 456 F.2d 414, and is printed in Appendix 5 hereto, infra pages A34-A44, inclusive. (Portions of the record relied upon are included in a separately presented Appendix pursuant to Rule 23(f).)

JURISDICTION

The Judgment of the Court of Appeals, Ninth Circuit, was entered on February 11, 1972. A timely petition for Rehearing En Banc was denied on April 26, 1972, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS FOR REVIEW

(1) Whether § 116(1) of the Bankruptcy Act empowers the Referee in a Chapter X proceeding to either reject petitioner's executory contract for the rendition of medical and pathological services to the debtor, or to abrogate petitioner's claim for damages resulting from the Receiver's confiscation of petitioner's property, medical practice and earnings in breach of said contract.

(2) Whether Rule 53(e)(2) Rules of Federal Procedure requires the Court of Appeals to review the District Judge where, contrary to the findings of the Referee, undisputed evidence confirms that the assignment of Petitioner's pathology contract was coerced by economic duress exerted by the Bankruptcy Court Receiver.

STATEMENT OF THE CASE

Dr. Theodor E. Bratrud, petitioner, agreed to furnish medical and pathology laboratory services to the patients and medical staff of Maryvale Community Hospital for a period of five years pursuant to a written contract dated October 25, 1962. Appendix A27-A33. Due to a default in the payment of interest to its bondholders the indenture trustee instituted an action in the state court for an accounting, ancillary to which the hospital was placed in receivership, with Mr. Fred Foster appointed as Receiver thereof. Contemporaneous with the state court action several of the bondholders filed a petition in the United States District Court for the District of Arizona for reorganization of the hospital under Chapter X of the Bankruptcy Act. This petition lay dormant until November 26, 1963, when the state court receivership was dismissed and, pending approval of the Chapter X petition, Mr. Foster was appointed Receiver of the hospital by the District Court.

Based upon his personal philosphy that the hospital's best interests required it to operate the pathology laboratory rather than that such services be supplied by a private medical practitioner, Mr. Foster, while acting as a state court Receiver and continuing after his appointment as District Court Receiver, embarked upon and pursued a course of action directed against Dr. Bratrud which included among others: (as the District Judge found from the undisputed evidence):

1. Confiscation of the Doctor's equipment, supplies and pathology laboratory premises;

2. Exclusion and eviction of Dr. Bratrud from the pathology and laboratory by changing the locks thereon;

3. Revocation of Dr. Bratrud's hospital staff privileges;

4. Transferance of all of the employees on the laboratory staff onto the payroll of the hospital;

5. The appointment of Dr. Davidson, Dr. Bratrud's assistant, to take charge of said laboratory;

6. The confiscation of Dr. Bratrud's laboratory mail;

7. Appropriation of all earnings of the laboratory for services rendered to the hospital except for $3,000.00, a sum barely sufficient to pay the laboratory payroll for such periods.

All of which caused petitioner to default in payments due upon contracts for equipment within the laboratory; as well as to default on accounts payable to his suppliers; to suffer a tax lien upon his property; as a consequence of which Dr. Bratrud faced personal bankruptcy and financial ruin. (Appendix A16-A19 inclusive).

Under the compulsion of these circumstances, Dr. Bratrud on April 28, 1964 assigned his rights in the pathology contract to Dr. Judson A. Davidson, effective May 1, 1964. On June 15, 1964, Dr. Bratrud filed a petition in the Chapter X proceedings seeking to recover the sum of $30,470.95 withheld from him as aforesaid in breach of the contract during the period from August 1, 1963 through April 30, 1964. On July 24, 1964, Trustee Dunning filed a petition for the termination of the pathology contract between Dr. Bratrud and the hospital pursuant to § 116(1) of the Bankruptcy Act; and on August 11, 1964, the Referee, Russell B. Taylor, entered an Order permitting the Trustee to terminate the contract effective August 3, 1964, and further ordered Dr. Bratrud to present his claim for damages as a result of such rejection. (Appendix A1-A2).

Dr. Bratrud filed his petition for damages on May 25, 1966 (Appendix A4-A8), and an Order to

Show Cause was issued thereon directed to respondent herein as to why such damages should not be paid from the debtor's assets. Respondent moved to quash said Order on the ground pertinent here, among others, that the pathology contract had been assigned by Dr. Bratrud prior to the time for which he sought compensation and therefore he had no rights under it. The Referee conducted a hearing on June 29 and 30, 1966, at which uncontradicted oral testimony and documentary evidence was introduced.

After a lapse of two years the Referee on September 18, 1968, entered Findings of Fact and Conclusions of Law, establishing among other things that Dr. Bratrud had voluntarily assigned all of his rights in the contract to Dr. Davidson on April 28, 1964, Finding of Fact 4 (Appendix A25) and that:

> "x x x On August 11, 1964, this Court entered its order that trustee reject the alleged agreement between petitioner and said hospital." Finding of Fact No. 5 (Appendix A25)

and concluded:

> "That as of August 11, 1964, the date of its termination, the petitioner had no right, title or interest in and to said agreement of October 25, 1962 (pathology contract) and could not have been and was not damaged by its termination." Conclusion of Law No. 3 (Appendix A26)

and judgment was entered accordingly denying petitioner's claim (Appendix A26-A27).

On petition for review pursuant to § 39, §§ c, of the Bankruptcy Act (11 U.S.C. § 67, §§ 3) the

District Court rejected as "clearly erroneous", the Referee's conclusory findings that petitioner voluntarily assigned his rights to the pathology contract and that neither the Trustee nor the Debtor corporation had terminated said contract prior to Bratrud's assignment to Dr. Davidson on April 28, 1964 (Appendix A14-A15); and in its "Opinion and Order" found that Mr. Foster as Receiver in both the state court and Bankruptcy receivership had exerted such coercion and economic duress that "Dr. Bratrud was forced to assign his contract to Dr. Davidson." (Appendix A19) and found:

> "Based upon the foregoing discussion, this Court finds and concludes that the Co-Receivers breached the contract dated October 25, 1962, between Dr. Bratrud and Maryvale Community Hospital, Inc., and that the assignment of said contract by Dr. Bratrud to Dr. Davidson was involuntary and the result of economic duress exerted by the Co-Receivers. x x x"

and further fixed Dr. Bratrud's loss in accordance with the formula for liquidated damages in the contract (Part III, Paragraph 8 Appendix A32) at $90,000.00 (Appendix A20). Judgment was entered thereon on November 19, 1969 (Appendix A21-A22).

The judgment rendered by the District Court was reversed by the Court of Appeals on the sole ground that there was an authorized rejection of Dr. Bratrud's pathology contract on August 11, 1964, pursuant to § 116(1) of the Bankruptcy Act (11 U.S. C. 516(1)) which ipso facto created a cause of action under § 202 of the Bankruptcy Act; and that by reason thereof whether the assignment was voluntary or not was immaterial.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ENLARGES § 116(1) OF CHAPTER X OF THE BANKRUPTCY ACT (11 U.S.C. § 516(1) TO PERMIT REJECTION OF EXECUTORY CONTRACTS BY REFEREES IN BANKRUPTCY CONTRARY TO THE RESERVATION OF THE STATUTE VESTING SUCH POWER EXCLUSIVELY IN THE DISTRICT JUDGE.

In reliance upon what it conceived to be an "authorized" rejection of petitioner's executory contract, the Ninth Circuit has sanctioned the power to reject executory contracts by the Referee in bankruptcy contrary to the plain language of § 116(1) and the duty inclusively vested in the District Judge to do so upon appropriate request. The order of court entered on August 11, 1964, repeatedly referred to and relied upon in the decision, as effecting the rejection of Dr. Bratrud's contract, was presented to, and signed by, Russell B. Taylor, Referee in bankruptcy (Appendix A1-A2). The executory contract was not rejected by order of the District Judge as required by § 116(1) even though this prerequisite is noted in the decision at 456 F.2d 417, but utterly ignored by the Court.

There are cogent reasons why the rejection of an executory contract is not delegable. The Fifth Circuit holds in Texas Importing Company, Ltd. v. Banco Popular de Puerto Rico, 360 F.2d 582, 584 (1966).

> "While in equity receiverships failure to reject, plus affirmative conduct over a long period may show an adoption, that rule should not be applied in Chapter X proceedings. Close judicial supervision of the entire proceeding is a major tenet of Chapter X. Assumption or adoption of executory contracts may have an important bearing on the

> financial status of the debtor, and should not be implied from conduct of the trustee or debtor in possession, but should be the result only of judicial consideration.
>
> "Our conclusion is supported by the text of Collier on Bankruptcy, 14th Ed. 1965 Revision of Vol. 6, ¶¶ 3.23, pp. 576-585, and by the adjudicated cases."

and see: In the Matter of Imperial '400' National, Inc., 429 F.2d 680, 682 (3rd Cir. 1970). In the Matters of American National Trust and Republic National Trust, et al v. C. E. Loveless, et ux, 426 F.2d 1064 (7th Cir. 1970).

In this posture, the Ninth Circuit could not find:

> "As a matter of law x x x" that any "x x x cause of action under Section 202 arose on August 11, 1964, when the trustee was authorized to reject the contract."

nor could it restrict Dr. Bratrud's petition for damages to a cause of action purportedly created on said date when the Referee without jurisdiction, power or other authority signed the order permitting rejection. This proceeding before the Referee was and remains an absolute nullity and justice requires that it be adjudicated as such.

In holding that there was a valid rejection of the contract under § 116(1) the Ninth Circuit has either expanded said section of the Bankruptcy Act to provide that Referee's now have the same power as a District Judge to reject executory contracts or by inadvertence has affected the destruction of petitioner's rights to receive compensation of substantial magnitude contrary to the intent of Congress and the settled law referred to herein. In either event

the Ninth Circuit's departure from the restrictions of § 116(1) vesting in the District Judge alone, the power to reject executory contracts, calls for the exercise of this Court's supervision less the practice proliferate.

The decision has important practical implications in addition to those expressed in the Texas Importing Company, Ltd., case, supra, for if compensation may be avoided for the rejection of executory contracts by permitting receivers and trustees in bankruptcy by coercive means or the exertion of economic duress to cause the transfer of valuable rights to selected friends or others under the holding that the causes motivating the assignment are immaterial in a § 116(1) rejection, then such device will find ready acceptance thoughtout the land, to the loss and damage of the very persons sought to be protected by the Act Congress specifically designed to relieve the oppressed and economically disadvantaged.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT ON THE SCOPE OF REVIEW UNDER RULE 53(e)(2) RULES OF CIVIL PROCEDURE (28 U.S.C.).

Given the fact that a correct construction of § 116(1) did not permit the Referee to reject Dr. Bratrud's executory contract, it must be conceded that the determination of whether the Referee's Findings of Fact, Conclusions of Law and Judgment entered thereon were clearly erroneous.

Given the fact that the Referee did not have the power to reject Dr. Bratrud's executory contract under § 116(1), his Findings of Fact, Conclusions of Law and Judgment thereon, were determinable by the District Judge on the certificate of Review, as a pure question of law. Costello v. Fazio, 256 F.2d 903 (9th Cir. 1949); Diamond Nat'l Corp. v. Lee, 333 F.2d 517, 523 (9th Cir. 1964). The "clearly

erroneous" rule does not apply for there was and under the circumstance, could not be any evidence whatsoever to support the Referee's findings. Bass v. Quittner Stutman & Treister, 381 F.2d 54. Under Rule 53(e)(2), Federal Rules of Civil Procedure, Appendix 6, A47) the District Court had the power to reject or modify the Referee's findings and order and did so. (Appendix A14-A22, inclusive). The judgment of the District Court having been appealed, the question arises as to whether the Court of Appeals should review the Referee or the District Judge. The precedent in the Ninth Circiut has been to review the Referee, Farmer Bros. Co. v. Huddle Enterprises, Inc., 366 F.2d 143 (1966); Miguel v. Walsh, 447 F.2d 724 (1971). This position is in conflict with the decision of this court in United States v. Merz, 376 U.S. 192, 11 L. Ed. 2d 629, 84 S. Ct. at 644 (1964) delineating the procedures to be followed on an appeal from a judgment entered by the District Court on a Rule 53 review in a condemnation case.

> "It may 'modify' the report on the basis of the record made before the commissioners, or it 'may reject it in whole or in part or may receive further evidence or may recommit it with instructions' -- all as provided in Rule 53(e)(2). We think the District Court in each of these cases should have the opportunity under Rule 53(e)(2) to make its decision afresh, in light of this opinion. We write on a clean slate against a background of a contrariety of views among the circuits. The reports in each of these cases leave much to be desired, measured by the standards we have suggested. None of the reports should have been adopted without more by the District Court. On remand, its informed discretion will be used to

> determine whether the matters should be resubmitted in whole or in part to the respective commissioners or whether, in light of the exigencies of the particular case, the court should itself resolve the disputes on the existing records, or on those records as supplemented by further evidence."
> (Emphasis supplied.)

There is no reason to apply a different rule to the circumstances of the case at bar and fact situations similar to it, especially where a statute imposes the duty on the District Judge to reject the contract. In such case the District Judge's ability to determine whether there has been a valid rejection of the executory contract is unassailable for the power to do so is reposed in the Judge alone. There is no distinction between a District Courts' review of a Commissioner's report as in Merz, supra, as compared with a Referee's findings which are as a matter of law "clearly erroneous". The Rule in Merz is a salutory one, but needs must be made applicable to all reviews brought under Rule 53(e)(2) and not, as seems to be the prevalent view, limited to condemnation cases alone. Cf. United States v. Hilliard, 412 F.2d 174 (8th Cir. 1969) and cases cited therein.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE SCOPE OF REVIEW UNDER RULE 52 (a) AND 53(e)(2), RULES OF CIVIL PROCEDURE (28 U.S.C.).

Civil Rule 52(a) (Appendix 6 - A46) provides that findings of fact shall not be set aside unless clearly erroneous. There is a decided cleavage among the circuits as to the scope of review in the Court of Appeals where the District Court rejects the findings of the Referee and reverses his Order. The Second Circuit holds that the question is the same in

the Court of Appeals as it is in the District Court, and the Referee's findings must be accepted unless they are clearly erroneous. Morris Plan Industrial Bank v. Henderson, 51 Am. Bankr. R. (n.s.) 79, 131 F.2d 975 (2d Cir. 1942); Mergenthaler v. Dailey, 53 Am. Bankr. R. (n.s.) 279, 136 F.2d 182 (2d Cir. 1943). The Ninth Circuit; Farmer Bros. Co. v. Huddle Enterprises, Inc.; and Miguel v. Walsh, supra, is in accord with the foregoing rule.

A contrary view is taken in the Fourth Circuit, where it is the Judge's findings and not the Referee's which are reviewed by the Court of Appeals. Mountain Trust Bank v. Shiffett, 255 F.2d 718 (1958). This rule is followed in Duvall v. Barry, 103 F.2d 653 (7th Cir. 1939). 2 Collier on Bankruptcy (14th Ed.) § 25.30 at 1023 through 1032 discusses the disparity in the views with particular emphasis on the seeming inconsistent decisions of the Eighth Circuit citing Katcher v. Wood, 109 F.2d 751 (1940) and Matter of Kansas City Journal Post Co., 144 F.2d 791 (1944) as an indication favoring the Fourth Circuit view but finally stating that said circuit is "firmly in the camp of the Second Ciruit's view citing O'Reiley v. Endicott-Johnson Corp. 297 F.2d 1 (8th Cir. 1961); Gross v. Fidelity and Deposit Co., 302 F.2d 338 (8th Cir. 1962); Employers Mut. Cas. Co. v. Hines, 309 F.2d 806 (8th Cir. 1962).

However, since Merz, supra, the Eighth Circuit in United States v. Hilliard, supra, albeit a condemnation case, squarely supports the Fourth Circuit's pronouncements in United States v. Twin City Power Co., 248 F.2d 108, 112 (1957) and quotes from a similar holding of the Tenth Circuit in United States v. Waymire, 202 F.2d 550, 553 wherein it is flatly stated:

> "We review the District Judge, not the Commissioners; and under Rule 52(a) we may not set aside his findings unless they are

clearly erroneous."

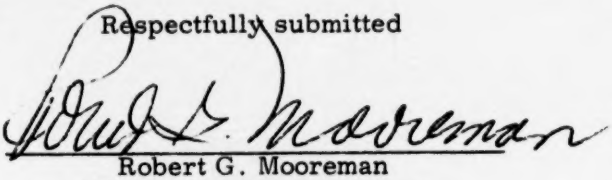
Accord O'Brien v. United States, 329 F.2d 949 (5th Cir. 1968).

The conflict among the circuits will remain until settled by the Supreme Court; or this Court specifically states that the rules laid down in United States v. Merz, supra, apply to all cases falling within the ambit of Rule 53(e)(2), supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and Opinion of the Ninth Circuit.

Respectfully submitted



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Appendix 1:

ORDER PERMITTING TRUSTEE TO REJECT ALLEGED EXECUTORY CONTRACT A1

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Appendix

(1)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN THE MATTER OF	)	
	)	Bankruptcy No.
MARYVALE COMMUNITY	)	B-9352-Phx.
HOSPITAL, INC., an	)	
Arizona Corporation,	)	
	)	
Debtor.	)	
	)	

ORDER PERMITTING TRUSTEE TO REJECT ALLEGED EXECUTORY CONTRACT

At Phoenix, in said District, on the 11 day of August, 1964.

The petition of Frank J. Dunning, Trustee of Maryvale Community Hospital, Inc., the above named Debtor, for permission to reject the alleged agreement between the Debtor corporation and Theodor E. Bratrud, M.D., dated October 25, 1962, having been heard on the 3rd day of August, 1964, and notice of said hearing having been given as prescribed by this Court in its order of July 24, 1964, to Theodor E. Bratrud, M.D., and after hearing Mr. John F. Sullivan, attorney for said Trustee, in favor of said petition, and Mr. Herbert Mallamo, attorney for said Dr. Bratrud,

NOW, upon said petition and all the proceedings had before me at the said hearing, and it appearing that the best interests of the estate require that the alleged executory contract be terminated,

IT IS ORDERED that Frank J. Dunning, Trustee of Maryvale Community Hospital, Inc., Debtor, be, and is hereby permitted to reject the alleged agreement between the said Debtor and Theodor E. Bratrud, M.D., dated October 25, 1962, and IT IS FURTHER ORDERED that said Theodor E. Bratrud, M.D., without

prejudice by reason of the foregoing, be permitted to present to this Court such claim or claims for injuries as may result from the rejection of the alleged executory agreement, and may be deemed a creditor of the estate in such amount as shall be determined proper by this Court upon further hearing of this matter.

IT IS FURTHER ORDERED that the entry of this order shall be deemed to constitute a rejection of the said alleged agreement.

DATED this 11 day of August, 1964.

/s/ Russell B. Taylor
REFEREE IN BANKRUPTCY

Copies of the foregoing Order
mailed to:

Mr. Herbert Mallamo, Attorney
for Theodor E. Bratrud, M.D.,
Luhrs Building, Phoenix, Arizona.

Mr. John G. Brennan, Attorney for
Bondholders Committee of Maryvale
Comminity Hospital, Inc., 3800 North
Central Avenue, Phoenix, Arizona.

Mr. Charles M. Duecy
44 East Indian School Road

Scottsdale, Arizona.

Securities & Exchange Commission
821 Market Street
San Francisco, California

this 12 day of August, 1964.
/s/ John F. Sullivan
Attorney for Trustee

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Appendix

(2)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation, Debtor	Bankruptcy No. B-9352-Phx.
THEODOR E. BRATRUD, Petitioner vs. FRANK J. DUNNING, as Trustee of the estate of said Debtor, Respondent	

PETITION BY THEODOR E. BRATRUD FOR ORDER TO SHOW CAUSE WHY TRUSTEE SHOULD NOT PAY DAMAGES FOR TERMINATION OF EXECUTORY AGREEMENT

TO THE HONORABLE CARL A. MEUCKE, UNITED STATES DISTRICT JUDGE:

The petition of THEODOR E. BRATRUD respectfully represents:

1. That he is a creditor in the aforesaid Chapter X proceedings by virtue of the rejection and termination of his executory contract with the Maryvale Community Hospital for laboratory services, a copy of which is attached hereto as Exhibit "A", said contract having been executed on or about October 25, 1962, under which the petitioner, as a Pathologist, agreed to conduct the Department of Pathology and provide services and supervision to meet the needs of the debtor hospital for a period of five years; that the validity of said agreement has heretofore been determined by this court by the Hon. Roger D. Foley on May 7, 1964, a copy of the Findings of Fact and Conclusions of Law being attached hereto as Exhibit "B", wherein the

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court specifically held that said agreement was, and at all times pertinent thereto, a "valid and subsisting Agreement".

2. That on or about May 11, 1964, the Hon. Roger D. Foley, Jr. entered an order approving creditors petition for reorganization and an order of referral to the Hon. Russell B. Taylor as Special Master, upon which a formal order of referral was entered on July 23, 1964.

3. That on or about July 30, 1964, Frank J. Dunning, as Trustee, petitioned (Doc. #88) this court to reject the executory agreement with Dr. Theodor E. Bratrud pursuant to Section 116, Subsection 1, of Article III, Chapter X, of the Act of Congress relating to Bankruptcy; that thereafter Roger D. Foley (Jr.), United States District Judge, entered an order to show cause authorizing the rejection of said contract and permitting respondent, Theodor E. Bratrud, to present to this court a claim for injuries which may have resulted from the rejection of said executory contract and authorizing the determination of damages; that said agreement was terminated on August 3, 1964 (Doc. #128); that sub-

sequent thereto the matter having been referred to Russell B. Taylor as Special Master and Referee in Bankruptcy, and the matter of the objections by Dr. Theodor E. Bratrud to the accounting of Fred Foster, the Chapter X Receiver, said Referee determined that in compliance with said agreement, prior to the rejection, Dr. Theodor E. Bratrud was entitled to the sum of $30,543.60, and on February 9, 1965, (Doc. #129) an order was entered directing said Trustee to pay said funds pursuant to the Findings of Fact and Conclusions of Law (Doc. #128) heretofore filed on January 28, 1965, that under the Findings of Fact and Conclusions of Law,

the Referee in Bankruptcy ordered that "the Court expressly reserves jurisdiction to hear and determine the injury and damages sustained or incurred by Theodor E. Bratrud by reason thereof" for said breach of contract.

4. That the contract of October 25, 1963, between Maryvale Community Hospital, Inc. and Dr. Theodor E. Bratrud, a copy of which is attached hereto as Exhibit "A", provided for damages for the termination thereof as follows:

> "If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss of the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on overage monthly reimbursement by the hospital to the pathologist during the year preceding the termination

of the pathologist."

5. That it appears from the records in these proceedings that the bondholders herein are the only other creditors affected by these proceedings and that 2% dividend was paid to the bondholders on or about July 20, 1965, and subsequently a 3% dividend or interest payment was paid on or about November 18, 1965, at which time the Trustee, Frank J. Dunning, alleged:

> "(b) That these bondholders represent the only unsatisfied creditors and that there are no prior creditors; that the only amounts owed by the hospital are by way of monthly accounts and all such accounts are paid to date."

6. That on or about March 21, 1966, the Trustee filed his Twenty-First monthly report as Trustee showing on Schedule "A" total assets of $3,324,532.44, including cash in bank of $103,634.43 and accounts receivable totaling $344,169.88; that

it therefore appears that upon liquidation and proof of the petitioner's damages for termination of the executory contract that there are sufficient assets in the estate to satisfy his claim as a creditor herein, the court having been previously advised on July 6, 1964, by the Trustee, Roland Wilpitz, (Doc. #66) wherein the Trustee's report and list of creditors by classification indicated "no unsecured creditors".

7. That pursuant to the provisions of the Bankruptcy Act relating to termination of executory contracts and damages therefor, the petitioner is entitled to a hearing upon the matter of said damages in accordance with the Findings of Fact and Conclusions of Law of the Referee and Special Master, wherein the Hon. Russell B. Taylor on or about

January 27, 1965, "expressly reserves jurisdiction to hear and determine the injuries and damages incurred by Theodor E. Bratrud by reason thereof".

8. That in accordance with the aforesaid pathologist agreement, the Trustee is bound to make up the financial loss to the petitioner for that period of time when he would normally be in practice, such period of time not to exceed six months and to be established as that time between which the termination of the pathologist was effected, that is, August 3, 1964, and at such time as the petitioner pathologist is able to secure new employment in his field, the amount of damages as spelled out in said contract to be fixed by the financial loss based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist; that in order to simplify the hearing on said matter, your petitioner has secured an accounting of the net funds due the laboratory

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from the hospital during its operation beginning in November, 1962, through April, 1964, a copy of the letter of Sheppard & Johnson, Certified Public Accountants, and the accounting due the laboratory for said period being attached hereto as Exhibit "C".

9. That your petitioner has been unable to secure new employment in his field because of the termination of the aforesaid agreement and that he has suffered substantial losses averaging in excess of $15,000.00 per month for a period greater than the six months period mentioned in said contract; that your petitioner has attempted to mitigate his damages by selling, assigning and transferring his interest under economic compulsion to Judson A. Davidson, M.D., the pathologist in operation of the present Pathology Department at Maryvale Hospital and that said transfer, assignment and sale was caused by the illegal restraining orders entered in

October, 1963, and subsequently on February 18, 1964, and the lengthy litigation which has ensued and is a record herein.

WHEREFORE, your petitioner prays that this court enter its order requiring the Trustee, Frank J. Dunning, to appear and show cause, if any he has, on a day certain, why the petitioner's damages should not be fixed and paid out of the assets of the estate as a creditor herein by virtue of the rejection and termination of the executory contract for laboratory services upon the submission of proofs herein.

HERBERT MALLAMO and
ROBERT G. MOOREMAN

By /s/ Robert G. Mooreman
Attorneys for Theodor E. Bratrud, Petitioner

[452]

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

THEODOR E. BRATRUD, being first duly sworn upon oath, deposes and says:

That he is petitioner herein; that the allegations contained in the foregoing petition are true and correct to the best of his knowledge, information and belief.

/s/ Theodor E. Bratrud
THEODOR E. BRATRUD

SUBSCRIBED AND SWORN to before me this 29 day April, 1966.

/s/ Mary B. Dooley
NOTARY PUBLIC

My Commission Expires:
Dec. 5, 1968

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Appendix

(3)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation, Debtor	Bankruptcy No. B-9352-Phx.

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA:

I, RUSSELL B. TAYLOR, Referee, do hereby certify that the above captioned matter was referred to me by order of the Honorable C. A. Muecke, District Court Judge, dated May 31, 1966; that in the due course of proceedings, a hearing was held on June 29 and 30, 1966, on the Petition of Dr. Theodore E. Bratrud for Order to Show Cause why the Trustee should not pay damages for the termination and breach of the executory agreement for the services of his Pathology Laboratory Department at the hospital.

STATEMENT OF QUESTION PRESENTED.

The following question arose pertinent to the said proceedings: Whether the ultimate negotiations and final sale of the Pathology Laboratory by Dr.

Bratrud to Dr. Davidson was an involuntary sale and transfer due to economic compulsion because of the acts and conduct of Fred Foster as Receiver in the State and Federal proceedings.

As set forth in my Findings, Conclusions and Judgment signed September 18, 1968, and filed September 26, 1968, I found that Dr. Bratrud voluntarily assigned said agreement to Dr.

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Davidson on April 28, 1964, and could not have been damaged by its termination.

CERTIFICATION OF RECORD BEFORE THE COURT.

I do further certify:

All proceedings, records, pleadings, minutes and exhibits set forth and described in the Designation of Contents of Record filed by Dr. Theodore E. Bratrud (Docket No. 388) and Respondent Trustee's Additional Designation of Contents of Record on Petition for Review (Docket No. 394) and the Order Authorizing Sale entered August 12, 1968 (Docket No. 371), wherein the purchaser, Good Samaritan Hospital, paid $5,100,000.00 and assumed all liabilities, contingent and actual, including the claim of Dr. Theodore E. Bratrud, which arose out of rejection and breach by the Trustee of a contract between Maryvale Hospital and Dr. Bratrud regarding the Pathology Laboratory Department.

DATED: March 17, 1969.

Respectfully submitted,

/s/ Russell B. Taylor
RUSSELL B. TAYLOR
Referee and Special Master

Appendix

(4)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of	)	
	)	
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,	)	No. B-9352 PHX - CAM
	)	
Debtor.	)	
	)	
THEODOR E. BRATRUD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
FRANK J. DUNNING, as Trustee of the Estate of said Debtor,	)	
	)	
Respondent.	)	

OPINION AND ORDER

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law[1] entered by Russell B. Taylor, Referee in Bankruptcy on September 26, 1968 in the above captioned cause are modified in the following ways:

1. Findings of Fact Nos. two, four, seven, and eight are rejected.

2. Conclusions of Law Nos. two, three, and four are rejected.

In passing on a petition for review of an order entered by a referee, the district judge sits "in effect" as an appellate court in reviewing the findings of the referee.

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1 See Appendix A for the full text of the Referee's Findings of Fact and Conclusions of Law.

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In re Sussman (D.C.N.Y., 1950) 88 F.Supp. 230; General Order 47 of the General Orders in Bankruptcy; and Rule 53(e)(II) of the Federal Rules of Civil Procedure provide that the findings of fact of a referee or special master shall be accepted "unless clearly erroneous." See also, Matter of Roark (D.C. Ky. 1939) 28 F.Supp. 515. These provisions are applicable to Chapter X in a corporate reorganization proceeding (General Orders 37 and 52 of the General Orders in Bankruptcy) and apply to a referee's order, as distinguished from a special master's report. In re Byrd Coal Co. (2nd Cir. 1936) 83 F.2d 190.

The petitioner, Dr. Theodor E. Bratrud, and the debtor, Maryvale Community Hospital, Inc., entered into a written contract on or about October 25, 1962, whereby Dr. Bratrud was designated and employed (as an independent contractor) as Pathologist for the Hospital for a period of five years,[2] commencing from the date of the written contract. The contract was found to be "a valid and subsisting agreement; and that the same is binding upon Fred Foster, Receiver herein," by Judge Foley in his Findings of Fact and Conclusions of Law, entered May 7, 1964.

Mr. Fred Foster was appointed Co-Receiver of the Hospital in a state court proceedings on August 1,

1963 and Co-Trustee in the Chapter X proceedings in the Federal Court on November 26, 1963. Up until Mr. Foster's initial appointment, there had been no apparent turmoil between Dr. Bratrud

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2 The contract is set out in its entirety in Appendix B.

and the Hospital.

After being appointed Co-Receiver, Mr. Foster decided the agreement between Dr. Bratrud and the Hospital was not in the interests of the Hospital.

Ex. D: Foster - p. 14

When Foster could not re-negotiate Dr. Bratrud's agreement, Mr. Foster regarded his contract as being terminated.

Ex. D: Foster - pp. 15-16
Lahr - p. 95
Meyers - pp. 140-141

Mr. Foster then took steps to enforce his determination that the agreement of October 25, 1962 was terminated, even before the Court terminated the contract on August 11, 1964, pursuant to Section 116, subsection 1, of Article III, of Chapter X of the Bankruptcy Act.

In September of 1963, Mr. Foster attended an executive meeting of the medical staff at which time he called for a vote of confidence on Dr. Bratrud and a majority of those present voted "no".

Ex. D: Foster - pp. 16-17

Ex. A: Attached to Petition of Receiver for Temporary Restraining Order and Order to Show Cause filed February 24, 1964.

The testimony of Dr. Bratrud to the effect that he was never notified of the staff meeting or given an opportunity to appear to make a statement and knew nothing about it until the Hospital Administrator sent a letter advising Dr. Bratrud that his staff privileges had been revoked, has not been refuted.

Ex. E: Bratrud - pp. 142 and 144.
Foster - pp. 39-52
Foster - p. 44
Lahr - pp. 87-88.

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Other steps taken by Mr. Foster and his administrator, Mr. Powell, included

(1) placing Dr. Davidson in charge of the Pathology Laboratory

Ex. D: Foster - pp. 22 and 58

(2) transfer of Dr. Bratrud's employees to the hospital payroll

Ex. D: Foster - p. 24

(3) collecting the money for laboratory services rendered by disregarding the contract by paying Dr. Bratrud only $3000 every two weeks from which Dr. Bratrud was to pay all his expenses, including bi-weekly wages of $3000 for his employees

Ex. D: Foster - pp. 47, 49-51, and 56
Ex. F: Foster - p. 70

(4) assumed all expenses of the laboratory

Ex. D: Kolmus - pp. 122 and 126-128

(5) changing the locks on the laboratory

Tr., Vol. II, June 29-30, p. 54-55
Tr., Vol. I, June 29, pp. 123-126
Ex. D: Foster - p. 23

(6) confiscating the laboratory mail

Tr., Vol. II, June 29-30, p. 55
Tr., Vol. I, June 29, pp. 123-126.

It is thus apparent to this Court that Dr. Bratrud's contract was breached when the Co-Receiver, Mr. Foster, refused to abide by its terms and prevented the Doctor from abiding by its terms. Dr. Bratrud's cause of action arose when the contract was breached and he was prevented from fulfilling his part of the agreement.

[1044]

Dr. Bratrud had effectively been evicted from the Hospital and denied his only source of monthly income by the improper withholding of the monies due him under the Pathology Laboratory contract. As a consequence of the Co-Receiver's actions, Dr. Bratrud was faced with a tax lien, default on various equipment contracts, default on accounts payable to his suppliers, and the liklihood of personal bankruptcy and financial ruin. Therefore, acting under the compulsion of these circumstances, Dr. Bratrud was forced to assign his contract to Dr. Davidson. Dr. Davidson was the person previously selected by the co-receivers to run the Pathology Laboratory for them and who had in fact, been operating the Laboratory under an agreement with the co-receivers since the one-sided termination of Dr. Bratrud's contract. This assignment to Dr. Davidson apparently was the end result desired by the co-receivers.

Counsel for the Trustee cites us to Fruhauf Southwest Garment Co. v. United States (Ct. of Cl., 1953) 11 F.Supp. 945, for the elements necessary for economic duress:

"(1) that one side involuntarily accepted the terms of another;

"(2) that the circumstances permitted no other alternative; and

"(3) that said circumstances were the result of coercive acts of the opposite party." Supra at p. 951 Although "mere stress of business conditions does not constitute duress where the defendant was not responsible for

such circumstances," (Lawrence v. Muter Co. (7th Cir. 1949) 171 F.2d 380), it is apparent in the case before that the laboratory had a lucrative business grossing approximately $157,563 for the eight month period from August 1, 1963 to March 31, 1964.

Ex. D: Foster - p. 74

Therefore, the duress was not caused by business stress but rather by the coercive tactics of the Co-Trustee. Dr. Bratrud had no alternative but to make the assignment to Dr. Davidson, who had already entered an agreement to operate the Laboratory. As for the element of voluntariness, when one has been evicted from his place of business; had his moneys, mails, and staff confiscated; and had his entire business virtually seized and turned over to another - it cannot be said there is voluntariness and no duress.

Based upon the foregoing discussion, this Court finds and concludes that the co-receivers breached the contract dated October 25, 1962 between Dr. Bratrud and Maryvale Community Hospital, Inc. and

that the assignment of said contract by Dr. Bratrud to Dr. Davidson was involuntary and the result of economic duress exerted by the co-receivers. This Court also finds and concludes that under the terms of said contract (Part III, paragraph 8), the hospital is bound to pay damages to Dr. Bratrud in an amount equal to six times the "average monthly reimbursement by the Hospital to the pathologist during the year preceding the termination of the pathologist" which monthly average was $15,000.

Tr., April 19, 1968, p. 27.

[1046]

IT IS HEREBY ORDERED that the petitioner submit to the Court, a form of judgment in accordance with this opinion.

DATED this 18th day of August, 1969.

/s/ C. A. Muecke
C. A. MUECKE
United States District Judge

[1047]

ROBERT G. MOOREMAN
832 First National Bank Bldg.
Phoenix, Arizona 85004
252-8744
HERBERT MALLAMO
216 Luhrs Building
Phoenix, Arizona 85003
252-3611

Attorneys for Theodore E. Bratrud

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of	)	
	)	No. B-9352-Phx. - CAM
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,	)	
	)	
Debtor	)	
	)	
THEODORE E. BRATRUD,	)	
	)	
Petitioner	)	
	)	
vs.	)	
	)	
FRANK J. DUNNING, as Trustee of the Estate of said Debtor,	)	
	)	
Respondent	)	
	)	

AMENDED JUDGMENT AGAINST FRANK J. DUNNING, AS TRUSTEE OF THE ESTATE OF SAID DEBTOR

This cause having come on to be heard as a Petition for Review concerning the claim of Dr. Theodore E. Bratrud and submitted for decision upon the evidence of record and memorandum of counsel, and the Court being fully advised in the premises and upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED as follows:

That the petitioner, Theodore E. Bratrud, recover of and against Frank J. Dunning, as Trustee of the Estate of the

[1188]

Debtor herein, the sum of Ninety Thousand Dollars ($90,000.00) as liquidated damages for the breach

of the Bratrud contract with Maryvale Community Hospital, Inc., with interest at the rate of six percent (6%) per annum from August 1, 1963, the date of the original involuntary petition for reorganization of the Debtor Corporation under the Chapter X proceedings filed herein, and petitioner's costs of action in the amount of $341.60, all pursuant to the Opinion and Order of this Court dated August 18, 1969.

IT IS FURTHER ORDERED vacating and setting aside the judgment of the Hon. Russell B. Taylor, Referee in Bankruptcy, dated April 18, 1968, at Las Vegas, Nevada.

Dated this 19th day of November, 1969.

/s/ C. A. Muecke
C. A. MUECKE, United States District Judge

APPROVED AS TO FORM:

/s/ John F. Sullivan
JOHN F. SULLIVAN

ROBERT G. MOOREMAN and HERBERT MALLAMO

By /s/ Robert G. Mooreman

[1189]

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

-0-0-

In the Matter of	)	
	)	Bankruptcy No.
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,	)	B-9352-Phx.
	)	
Debtor.	)	
	)	
THEODOR E. BRATRUD,	)	
Petitioner,	)	
-vs-	)	
FRANK J. DUNNING, as Trustee of the Estate of said Debtor,	)	
Respondent.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause coming on regularly for hearing on the 29th day of June, 1966, before the Honorable Russell B. Taylor, Special Master and Referee, upon the petition of Theodor E. Bratrud for Order to Show Cause why Trustee should not pay damages for termination of executory agreement and the subsequent order entered on June 8, 1966; the petitioner appearing in person and by his counsel, Robert G. Mooreman; the Trustee appearing in person and by his counsel, John F. Sullivan; and Maryvale Community Hospital Bondholders' Committee appearing by its counsel, John G. Brennan; the trustee having filed his motion to quash order to show cause, and the parties having introduced evidence both oral and documentary, and the Court, having considered the same, finds the facts and states conclusions of law as follows:

FINDINGS OF FACT

1. That on or about October 26, 1962, Maryvale Community Hospital, Inc., an Arizona corporation, and Theodor E. Bratrud

APPENDIX A

[1048]

made and entered into a certain agreement in writing, wherein and whereby said respondent, Theodor E. Bratrud, was designated and employed as pathologist for said hospital for a term of five years from said date.

2. That said agreement required, and the said Theodor E. Bratrud furnished, professional services under and in accordance with said agreement for the period August 1, 1963, to and including the 30th day of April, 1964.

3. That said agreement in writing dated October 25, 1962, inter alia, on page 5 paragraph 8, provided:

> "8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist."

4. That on April 28, 1964, Theodor E. Bratrud voluntarily assigned all of his right, title and interest in and to the said agreement of October 25, 1962, to Dr. Judson A. Davison, Pathologist, and thereafter negotiations for a new pathological contract were entered into between Maryvale Community Hospital, Inc., and Dr. Davison.

5. That on July 22, 1964, the Trustee petitioned this Court to reject said agreement of October 25, 1962, and on August 11, 1964, this Court entered its order that trustee reject the alleged agreement between petitioner and said hospital.

6. That on April 30, 1965, petitioner wrote respondent advising him that the said contract for laboratory services was terminated by mutual agreement.

7. That neither respondent nor the debtor corporation terminated the aforesaid agreement of October 25, 1962, prior to its total assignment to Dr. Judson A. Davison on April 28, 1964.

8. That the order to show cause herein issued against respondent should be quashed and the petition of petitioner, Theodor E. Bratrud, be denied.

CONCLUSIONS OF LAW

1. That the debtor corporation and petitioner, Theodor E. Bratrud, entered into an agreement dated October 25, 1962, wherein petitioner was designated and employed as pathologist for said hospital.

2. That petitioner voluntarily assigned said agreement to Dr. Judson A. Davison on April 28, 1964, which assignment became effective May 1, 1964.

3. That as of August 11, 1964, the date of its termination, the petitioner had no right, title or interest in and to said agreement of October 25, 1962, and could not have been and was not damaged by its termination.

4. That the order to show cause heretofore issued on June 8, 1966, against the respondent, Frank J. Dunning as Trustee of Maryvale Community Hospital, Inc., an Arizona corporation, debtor, is hereby quashed and the petition of Theodor E. Bratrud is hereby denied.

DATED this 18th day of September, 1968.

/s/ Russell B. Taylor
RUSSELL B. TAYLOR,
Referee in Bankruptcy

[1050]

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

-0-0-

In the Matter of	)	
	)	Bankruptcy No.
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,	)	B-9352-Phx.
	)	
Debtor.	)	
	)	
THEODOR E. BRATRUD,	)	
	)	
Petitioner.	)	JUDGMENT
	)	

- vs -

FRANK J. DUNNING, as Trustee of the estate of said Debtor,

Respondent.

Pursuant to the Findings of Fact and Conclusions of Law, contemporaneously filed with this Order, the Court does hereby

ORDER AND DECREE that the order to show cause in this proceeding heretofore entered on June 8, 1966, be, and the same is hereby, quashed.

IT IS FURTHER ORDERED that the petition by Theodor E. Bratrud for order to show cause why trustee should not pay damages for termination of executory agreement be, and the same is hereby, dismissed.

DATED this 18th day of September, 1968, at Las Vegas, Nevada.

/s/ Russell B. Taylor
RUSSELL B. TAYLOR,
Referee in Bankruptcy

[769]

Exhibit "A"

AGREEMENT

THIS AGREEMENT made and entered into this 25 day of October, 1962, by and between MARYVALE COMMUNITY HOSPITAL, INC., an Arizona non-profit corporation, hereinafter designated as Hospital and THEODOR E. BRATRUD, hereinafter designated as Pathologist.

W I T N E S S E T H:

WHEREAS, the hospital is desirous of establishing and maintaining a department of pathology and in connection therewith to maintain standards in the practice of pathology which will meet with the requirements of approval by the Joint Commission of Accreditation of Hospitals, the American Society of Clinical Pathologists and the College of American Pathology and

WHEREAS, the pathologist will be a physician duly licensed to practice medicine in the State of Arizona and a recognized specialist in pathology elegible for certification by the American Board of Pathology in pathologic anatomy and/or clinical pathology.

WHEREAS, both parties recognize that the practice of medicine is legally a franchise granted by the State to an individual after rigid technical training and due examination, and it is the desire of both parties that the professional services of the pathologist be made available to the patients in the hospital and to the professional staff of the hospital.

I. THE HOSPITAL COVENANTS AND AGREES AS FOLLOWS:

1. To make adequate provisions for proper and adequate space for the pathology department including but not limited to operating space for technology and personnel, storage space for supplies and pathological specimens, laboratory space, and quarters

APPENDIX B

[1051]

for the housing and maintenance of animals as may be required for clinical diagnostic and experimental procedures and to equip such space with the necessary basic equipment and facilities to maintain such

department.

2. To act as the billing, accounting and collecting agent for the pathologist for all in-patient and emergency room hospital pathology services and to maintain such books and records as are necessary to provide this service, said books and records to be made available for inspection and copying by the pathologist or his staff at such time and place as shall be mutually convenient to hospital and pathologist or his staff.

3. To provide lighting, heating, janitor service, telephone service and all basic utilities to the space provided for the pathology services.

4. The hospital will remit on the 1st and 15th of each month for the semi-monthly period just prior to each date to the pathologist 80% of all in-patient and emergency room hospital billings for laboratory services, the pathologist or his staff to run and maintain the department of pathology and laboratory as he sees fit, subject to the provisions of this agreement. The pathologist will be reimbursed based upon his records of in-patient services. Such records may be examined by the hospital periodically.

II. PATHOLOGIST COVENANTS AND AGREES AS FOLLOWS:

1. To assume the responsibility for the conduct of the department of pathology and to devote such time as is necessary to provide proper and adequate service and supervision which will meet the needs of the patients and/or the medical staff.

2. To be responsible for matters of general policy,

cedures, and the development of clinical or other research projects within the department of pathology.

3. To be responsible for the prompt performance of all laboratory examinations requested, the preparation of written reports and the retention of such materials as microscopic sections; to keep accurate and complete records, including a proper filing system.

4. To be responsible for the performance of duly authorized autopsies on hospital patients properly admitted, whose deaths are legally regarded as hospital deaths, and to make available promptly for the hospital record, the attending physician and the departmental files, reports including both gross and microscopic findings, and to preserve pertinent tissues, blocks and sections in conformity with established customs and laws at no charge to the hospital.

5. To engage such physicians and technicians and other personnel as are required for the proper functioning of the department and to be responsible for the purchase of all supplies and equipment necessary for the conduct and improvement of the pathology service.

6. To provide, without charge, such pathology services as may be required for the care of bona fide charity patients of the hospital and also that which is necessary to protect patients and personnel from communicable diseases within the hospital.

7. To provide for consultations at operations and for frozen section diagnosis and for consultation with staff physicians.

III. THE PARTIES MUTUALLY COVENANT AND AGREE AS FOLLOWS

1. For and in consideration of the services to be

rendered and the convenants to be performed by the hospital, pursuant to Section I of this agreement, the pathologist or his staff agree to reimburse the hospital 20% of the gross billings for the laboratory as and for payment of rent, lights, heat, in-patient bookkeeping and accounting, telephone service and janitor service, and basic utilities. The books and records of the hospital insofar as they relate to the income or fees produced by or earned from the laboratory or the pathologist and his staff shall be subject to the inspection and audit of the pathologist and his staff as above mentioned in Paragraph I Section 2. In the event there is any dispute between the parties hereto concerning the amount of income due and payable to either party hereunder, findings and report of a certified public accountant mutually acceptable to both parties shall be conclusive in such determination.

2. The pathologist or his staff may provide services to patients, citizens and institutions outside the hospital and any remuneration therefore shall belong entirely to the pathologist and his staff, provided, however, that such other professional activities must not interfere with services to the hospital staff and patients as designated herein.

3. The pathologist shall be known and designated as Chief of the Pathology Department and shall have status equivalent to that of any other Chief of Services within the hospital and shall be a member of the medical executive committee the same as other department heads with the pathology services to be a division of the hospital staff equal in all respects to other division of the hospital.

4. The pathologist shall be an independent

contractor

and maintain and operate the department of pathology and the laboratory exclusively under his supervision with the right to make such rules and regulations; to hire and fire personnel necessary for the operation of the laboratory and to decide all matters of policy pertaining to the department of pathology insofar as these provisions do not directly conflict with any hospital laws, by-laws, provisions, or policies.

5. The pathologist or his staff shall provide for continuing professional service.

6. This agreement shall be applicable and continued in force with any associates or assigns of the pathologist and shall be binding upon the successors and assigns of the hospital.

7. This agreement shall be for a term of five (5) years from this date and shall be deemed to be automatically renewed unless terminated in writing by either party at least 180 days prior to the renewal date.

8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the hear preceding the termination of the pathologist.

9. Any of the matters contained in this agree-

ment may be altered from time to time by the written consent of the parties to this agreement without in any way effecting the remainder of

[1055]

this agreement.

10. This agreement shall supercede and replace any and all previous agreements entered into by and between THEODOR E. BRATRUD and the hospital.

IN WITNESS WHEREOF the parties have caused this agreement to be executed at Phoenix on the 25th day of October, 1962.

MARYVALE COMMUNITY HOSPITAL

By /s/ William E. McGee, Jr., M.D.
President

Attest:

Signature illegible
Secretary

By /s/ T. E. Bratrud, M.D.
T. E. BRATRUD, M.D.

Appendix

(5)

IN RE MARYVALE COMMUNITY HOSPITAL, INC.

456 F.2d 414 (1972)

In the Matter of MARYVALE COMMUNITY HOSPITAL, an Arizona corporation, Debtor.

Frank J. DUNNING, as Trustee of the Estate of Maryvale Community Hospital, Appellant,

v.

Theodore E. BRATRUD, Appellee.

No. 25500.

United States Court of Appeals, Ninth Circuit.

Feb. 11, 1972

Rehearing Denied April 20, 1972.

Rehearing En Banc Denied April 26, 1972.

Appeal by trustee of bankrupt hospital from a judgment of the United States District Court for the District of Arizona, C. A. Muecke, J., awarding doctor damages as a result of the rejection of his pathology contract with the hospital. The Court of Appeals held that doctor was not entitled to recover damages where the contract was found to be in full force and effect until it was rejected, and the doctor had assigned the contract to another doctor before it was rejected, even if the assignment had been involuntary because of the activities of a prior receiver.

Reversed and remanded with directions.

1. Bankruptcy Key 673

After a court has approved a Chapter X reorganization petition, trustee appointed in that proceeding must within a reasonable time recommend to the court whether to adopt or reject debtor's executory contracts, and the power to reject such contracts resides only in the judge before whom the reorganization proceeding is pending, and not in the receiver, trustee or the referee to whom the proceedings may be generally referred. Bankr.Act, § 116(1), 11 U.S.C.A. § 516(1).

2. Bankruptcy Key 673

Where executory contract of bankrupt is judicially rejected, the rejection is effective immediately and for all purposes. Bankr.Act, § 116(1), 11 U.S.C.A. § 516(1).

3. Bankruptcy Key 673

Judicial rejection of executory contract of debtor constitutes breach of the contract which gives rise to cause of action in the other party for damages, and any party injured by the rejection is deemed a creditor of the debtor holding a provable claim which will be treated on a parity with other similar claims. Bankr.Act, §§ 116(1), 202, 11 U.S.C.A. §§ 516(1), 602.

4. Bankruptcy Key 673

Doctor was not entitled to recover damages after his pathology contract with bankrupt hospital was judicially rejected where the contract was found to be in full force and effect until it was rejected, and the doctor had assigned the contract to another doctor before it was rejected, even if the assignment had been involuntary because of the activities of a prior receiver. Bankr.Act, §§ 116(1), 202, 11

U.S.C.A. §§ 516(1), 602.

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Charles M. Duecy (argued), of Duecy, Moore, Petsch & Robinson, Scottsdale, Ariz., John F. Sullivan, Phoenix, Ariz., for appellant.

Before ELY and HUFSTEDLER, Circuit Judges, and Ferguson,* District Judge.

PER CURIAM:

This case arises out of the Chapter X bankruptcy proceedings involving Maryvale Community Hospital, Inc., which are set forth in the opinion of this court filed this date entitled, "In the Matter of MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation, Debtor; HEALTH FACILITIES PLANNING COUNCIL, an Arizona nonprofit corporation, Appellant v. FRANK J. DUNNING, as Trustee of the Estate of said Debtor, Appellee; GARY K. NELSON, the Attorney General of the State of Arizona, Appellant v. FRANK J. DUNNING, as Trustee of the Estate of said Debtor, Appellee", Numbers 25,586 and 25,587, 456 F.2d 410.

Here, the appeal is from a judgment entered in those proceedings by the district court in favor of Dr. Theodore E. Bratrud against the Chapter X trustee in the amount of $90,000. We reverse.

The following relevant facts govern this appeal:

1. On October 25, 1962, Dr. Bratrud, appellee herein, and Maryvale Hospital executed an agreement pursuant to which Dr. Bratrud became the pathologist for the hospital for a term of five years.

* Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

2. In July, 1963, upon a default in payments to the hospital's bondholders, the indenture trustee filed a state court action for an accounting and the appointment of a receiver to manage the hospital.

3. On July 31, 1963, co-receivers, one of which was Fred Foster, were appointed by the state court.

4. The next day, five of the bondholders filed a petition in federal district court for reorganization of the hospital under Chapter X of the Bankruptcy Act.

5. On November 26, 1963, the state court action was dismissed, and pending the approval of the Chapter X petition, Mr. Foster was appointed receiver of the hospital by the district court.

6. On May 11, 1964, the district court approved the Chapter petition and appointed Mr. Roland Wilpitz as trustee. Subsequently, Mr. Wilpitz resigned, and Mr. Dunning, the appellant herein, was appointed as his successor.

7. Meanwhile, while he was the interim Chapter X receiver, Mr. Foster filed a petition in the district court alleging that during the previous state court receivership disputes had arisen between the state receivers and Dr. Bratrud concerning the termination of the pathology contract. Mr. Foster sought an order to restrain Dr. Bratrud from performing any activities at the hospital.

8. On February 18, 1964, the district court issued a temporary restraining order preventing Dr. Bratrud from occupying the pathology laboratory, and an order to show cause why a preliminary injunction should not be granted.

9. After a trial, a judgment was entered which set forth:

forth:

(a) Dr. Bratrud and the hospital entered into the pathology contract on October 25, 1962.

(b) On October 28, 1963, in the state court action by the indenture trustee, an order was made purporting to terminate the contract.

(c) However, the contract was still in full force and effect and binding upon Mr. Foster as the Chapter X receiver.

(d) The temporary restraining order was vacated and the petition for an injunction was denied.

10. Shortly thereafter, on June 15, 1964, Mr. Foster filed a final account and report and petition for allowance of fees. The district court referred these matters for hearing to the bankruptcy referee, as special master in the Chapter X proceeding. Dr. Bratrud filed exceptions to Mr. Foster's accounting and petitioned the court for the payment of the sum of $30,470.95 as the sum due him under the contract from August 1, 1963, through April 30, 1964.

11. On July 24, 1964, Trustee Dunning filed a petition to terminate the contract between Dr. Bratrud and the hospital pursuant to Section 116(1) of Chapter X of the Bankruptcy Act.

12. On August 11, 1964, an order was entered which permitted the trustee to terminate the contract, effective August 3, 1964, and, pursuant to Section 202, authorized Dr. Bratrud to present such claims for damages as he might suffer as the result of the rejection of the contract. The order provided that he be deemed a creditor in such amount as the court may subsequently determine. Dr. Bratrud at no time objected to the order permitting Trustee Dunning to reject the contract.

13. On February 9, 1965, the referee, with reference to Foster's accounting and Dr. Bratrud's claim in that proceeding, issued his order finding that Dr. Bratrud was entitled to the sum of $30,543.60 as money due him under the pathology contract from August 1, 1963 through April 30, 1964, and ordered Trustee Dunning to pay Dr. Bratrud that sum. Dr. Bratrud was paid such amount.

14. All of the preceding judgments and orders have become final.

15. On May 25, 1966, Dr. Bratrud filed a petition for an order to show

cause why Trustee Dunning should not pay damages for rejection of the pathology contract.

16. The district court referred this matter to the referee for hearing and determination. On June 8, 1966, the referee issued an order directed to Trustee Dunning to show cause why Dr. Bratrud's damages should not be paid out of the debtor's assets.

17. Trustee Dunning then moved to quash this order upon the ground, first, that the district judge had not fixed the time pursuant to Sections 196 and 197 of Chapter X for filing proofs of claims of creditors and that Bratrud, an unsecured creditor at best, was seeking a priority over secured creditors, and his petition was not timely; and, secondly, that the pathology contract had been assigned by Dr. Bratrud prior to the time for which he sought compensation and Dr. Bratrud, therefore, had no rights under it.

18. The referee conducted an evidentiary hearing on June 29 and 30, 1966, and then issued an order which determined that:

(a) On April 28, 1964, Dr. Bratrud had volun-

tarily assigned all his rights in the contract to Dr. Judson A. Davidson, which assignment became effective May 1, 1964.

(b) Neither Dr. Bratrud nor the debtor hospital had terminated the contract prior to that assignment.

(c) Dr. Bratrud wrote to Trustee Dunning that his pathology contract with the hospital had been terminated by mutual agreement.

(d) As the contract had been assigned by Dr. Bratrud prior to the order authorizing rejection, he could not be and was not damaged by the rejection.

19. Dr. Bratrud then filed a petition for review of the referee's findings. The sole issue certified to the district court was the finding by the referee that Dr. Bratrud's assignment of his contract was voluntary.

20. The district court, on review of the record, held that Mr. Foster, during the time that he was the state court co-receiver and federal court receiver, had breached the contract by his actions in preventing Dr. Bratrud from performing under it and evicting Dr. Bratrud from the hospital. The court held that because of Receiver Foster's acts, Dr. Bratrud was forced economically to assign the contract to Dr. Davidson, and the assignment was not voluntary as the referee had found. The district court entered a judgment vacating the referee's order and awarding Dr. Bratrud the sum of $90,000 against Trustee Dunning. This figure was determined by a formula for liquidated damages in the contract. It is from that judgment that the trustee appeals.

Section 116(1) of Chapter X of the Bankruptcy Act (11 U.S.C. § 516(1)) provides that "upon the approval of a petition, the judge may . . . permit

the rejection of executory contracts of the debtor . . . ." Section 202 (11 U.S.C. § 602) provides that "In case an executory contract shall be rejected pursuant . . . to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall . . . be deemed a creditor".

[1-3] After a court has approved a Chapter X reorganization petition, the trustee appointed in that proceeding must within a reasonable time recommend to the court whether to adopt or to reject the debtor's executory contracts. Philadelphia Co. v. Dipple, 312 U.S. 168, 61 S.Ct. 538, 85 L.Ed. 651 (1941). By the terms of Section 116(1), the power to reject such contracts resides only in the judge before whom the reorganization proceeding is pending, and not in the receiver, the trustee or the referee to whom the proceeding may be generally referred. Matter of Cheney Brothers, 12 F.Supp. 605 (D.Conn.1935). Where a contract is rejected pursuant to Sec-

tion 116(1), the rejection is effective immediately and for all purposes. 6 Collier, Bankruptcy ¶ 3.24 [1], at 591-92 (1969). A rejection constitutes a breach of the contract which gives rise to a cause of action in the other party for damages. Workman v. Harrison, 282 F.2d 693 (10th Cir.1960); Matter of United Cigar Stores Co. of America, 89 F.2d 3 (2nd Cir.1937). By virtue of Section 202, any person injured by the rejection is deemed a creditor of the debtor holding a provable claim which will be treated on a parity with other similar claims. Matter of Greenpoint Metallic Bed Co., Inc., 113 F.2d 881 (2nd Cir.1940).

[4] Applying these principles, it is clear that the district court erred in awarding Dr. Bratrud $90,000. We begin with the fact that the pathology contract

was in full force and effect until it was rejected by the order of August 11, 1964. Prior to that time Receiver Foster had petitioned to exclude Dr. Bratrud from the hospital. However, the district court found specifically that the state court order which purported to terminate the contract was invalid, and that the contract was in full force and effect. Therefore, that part of Section 202 which refers to an executory contract having been rejected by a "receiver in equity in a prior pending proceeding" is not applicable to this case. Furthermore the order of August 11, 1964, permitting the trustee to reject the contract, was in itself an implicit finding that the contract was still in effect on that date.

Dr. Bratrud does not challenge the finding of the referee, which was not found otherwise by the district court, that Dr. Bratrud assigned all his right, title and interest in the pathology contract to Dr. Davidson for valuable consideration on April 28, 1964. He does not contend that the assignment is voidable, and he has taken no action to vacate that assignment. It thus appears, as the referee found, that Dr. Bratrud had no right in the contract at the time it was rejected.

When the pathology contract was rejected pursuant to Section 116(1), Dr. Bratrud became a creditor of the debtor hospital as provided in Section 202, and was entitled to recover in the Chapter X proceeding any damages he suffered as a result of such rejection. Dr. Bratrud has maintained throughout these proceedings that the purpose of his action was, and is, to recover damages as a Section 202 creditor. The referee applying traditional contract principles, found that the appellee had suffered no damages as a result of the rejection of the pathology contract because he had no right or interest in the contract at the time it was rejected. We agree.

The district court misconstrued the nature of appellee's action. The sole question certified to the district court on review was whether the assignment

from Dr. Bratrud to Dr. Davidson was voluntary. After reviewing the activities of Receiver Foster with regard to appellee, the court concluded that the assignment was involuntary and the result of economic coercion by the receivers, and that the "cause of action arose when the contract was breached [by the receivers] and [Dr. Bratrud] was prevented from fulfilling his part of the agreement". As a matter of law, however, the cause of action under Section 202 arose on August 11, 1964, when the trustee was authorized to reject the contract. That statement by the district court is, in effect, a finding against receiver Foster for tortious interference with the contractual arrangements between Dr. Bratrud and the hospital. Any damages to appellee which may have resulted from such conduct cannot properly be considered within the context of proceedings for damages resulting from the approved rejection of the contract. The district court improperly turned a hearing on a claim for damages for judicial rejection of the contract into a judgment against the trustee by reason of tortious conduct of the receiver.

The question of what motivated Dr. Bratrud to assign his contract is irrelevant for the purpose of determining

damages for an authorized rejection. No section of the Bankruptcy Act has been cited to this court which provides that an involuntary trnasfer may be disregarded in a proceeding for damages for a Section 116(1) contract rejection. Such a rule could lead to the inequitable situation where two claimants seek damages for rejection on a specific date of a single contract which had been assigned sequentially and for valuable consideration between them.

Although bankruptcy proceedings are equitable in nature, Pepper v. Litton, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939); Local Loan Co. v.

Hunt, 292 U.S. 234, 240, 54 S.Ct. 695, 78 S.Ct. 1230 (1934), equity cannot be stretched to the point of permitting a proceeding for damages caused by the rejection of a contract by a trustee to result in damages for alleged tortious conduct while the contract was in effect.

The judgment is reversed and the cause is remanded to the district court with directions to issue its judgment affirming the order of the referee.

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Appendix

(6)

STATUTES and RULES INVOLVED

Section 116(1) (11 U.S.C. 516)

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court --

(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate;" * * *

Section 196 (11 U.S.C. 596)

"After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court."

Section 202 (11 U.S.C. 602)

"In case of executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor. * * *"

11 U.S.C. following Section 53

"General Order 47 of the Bankruptcy Order provides:

> Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.)

Rule 52(a)

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.)

Rule 53(a)

"(a) Appointment and Compensation. Each district court with the concurrence of a majority of all judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word 'master' includes a referee, an auditor, an examiner, a commissioner, and an assessor. * * *"

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.)

Rule 53(e)(2)

"(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instruction."

COPY

In the Supreme Court of the United States

Supreme Court, U. S.
FILED
AUG 23 1972
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1971

No. 72-143

In the Matter of
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,
Debtor.

THEODORE E. BRATRUD,
Petitioner,

vs.

FRANK J. DUNNING, as Trustee of the Estate of Maryvale Community Hospital,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondent in Opposition

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondent in Opposition

STATEMENT OF JURISDICTION AND THE PARTIES

This is a response by Respondent Dunning to Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit by the Petitioner arising out of a judgment adverse to the Petitioner, Bratrud, in *In The Matter of Maryvale Community Hospital, Inc., Frank J. Dunning, Trustee, vs. Theodore E. Bratrud,* 456 F2d 414 (1972).

Petitioner herein is *Dr. Theodore E. Bratrud,* hereafter referred to as *Petitioner* or *Bratrud.* He was Appellee in the court below.

Respondent herein is *Frank J. Dunning*, Trustee of *Maryvale Community Hospital, Inc.*, Debtor in Reorganization of the *Maryvale Community Hospital, Inc.*, Cause No. B-9352-PHX., United States District Court for Arizona. Hereafter he will be referred to as *Dunning* or *Respondent*. He was Appellant in the court below.

Jurisdiction has been invoked by Petitioner pursuant to 28 U.S.C. § 1254(1).

Respondent asks this Court to examine the Petition for Writ of Certiorari in the light of the considerations governing review on Certiorari as set forth in Rule 19 of this Court's Rules.

Jurisdiction in the Court of the first instance (United States District Court for the District of Arizona) rests on the District Court's jurisdiction to authorize rejection of an Executory Contract pursuant to § 116(1) of the Bankruptcy Act, 11 U.S.C. § 516(1); its jurisdiction to allow damages for rejection of an Executory Contract and deem the party injured thereby a creditor of the estate rests on § 202 of the Bankruptcy Act, 11 U.S.C. § 602; and its jurisdiction to hear and summarily determine objections by the Trustee and other designated parties to creditors claims rests on §§ 196 and 197 of the Bankruptcy Act, 11 U.S.C. § 596 and 597.

In addition to the foregoing, the jurisdiction of the District Court and the Appellate Court rests in Article III, §§ 111-121 of Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 511-521. Appellate jurisdiction is further governed by § 24 of the Bankruptcy Act, 11 U.S.C. § 47.

QUESTIONS PRESENTED FOR REVIEW BY PETITIONER BRATRUD

Petitioner Bratrud has presented two questions for review:

The questions have been set forth as follows:

"(1) Whether § 116(1) of the Bankruptcy Act empowers the Referee in a Chapter X proceeding to either reject petitioner's executory contract for the rendition of medical and pathological services to the debtor, or to abrogate petitioner's claim for damages resulting from the Receiver's confiscation of petitioner's property, medical practice and earnings in breach of said contract."

and

"(2) Whether Rule 53(e)(2) Rules of Federal Procedure requires the Court of Appeals to review the District Judge where, contrary to the findings of the Referee, undisputed evidence confirms that the assignment of Petitioner's pathology contract was coerced by economic duress exerted by the Bankruptcy Court Receiver."

STATEMENT OF THE CASE

The events leading to this litigation and finally to the instant Petition for Certiorari by the Appellee, Theodore E. Bratrud, are set forth as follows:—

On October 25, 1962, Petitioner Bratrud, a Pathologist, executed an Agreement with Maryvale Community Hospital pursuant to which he became contract Pathologist for the hospital.

In late July of 1963, equity co-receivers were appointed of the Maryvale Community Hospital, Inc., by the Superior Court of Arizona, Maricopa County, in Cause No. 151970 before that Court.

Following initiation of the State Court Receivership, an Involuntary Petition for Reorganization of the Maryvale Community Hospital, Inc. was filed pursuant to Chapter X of the Bankruptcy Act. The Petition under Chapter X was filed on August 1, 1963.

On November 26, 1963, a certain Fred Foster was appointed Receiver in the Chapter X proceedings pending the hearing on the Petition which was contested.

On February 28, 1964, Receiver Foster filed a Petition against Bratrud for a Temporary Restraining Order praying that Bratrud be enjoined from entering upon the Pathology Laboratory of the Maryvale Community Hospital, Inc. or doing or performing any activities, functions or actions in the laboratory of the hospital and that an Order to Show Cause issue why a preliminary injunction thereon should not be granted. (Appendix Item I).

The Receiver's Petition was heard on March 9, 1964, at which time Bratrud filed a Response to the Receiver's Petition and filed an "Application for Leave to Sue the Receiver". (Appendix Item II).

The matter came on for hearing on March 26, 1964.

At the March 26, 1964, hearing, Bratrud asked if the Court required an additional "Petition for Leave to Sue Receiver Foster." Judge Foley said it would be treated independently. (Appendix Item III).

At no time thereafter did Bratrud pursue his efforts or petition to sue Receiver Foster.

On April 28, 1964 Bratrud sold and assigned his Pathology Contract to Dr. Judson A. Davison. Bratrud was paid by Dr. Davison $30,000.00. Davison also assumed over $26,000.00 of Bratrud's debts under the Pathology Contract. (See Appendix Items IV and V for Agreements executed by Bratrud that were before the Referee and District Court as evidence and a part of the Record on Appeal).

Item V of Appendix contains the statement by Dr. Bratrud, under oath, that the agreement to assign was without "any undue influence, fraud, coercion or misrepresentation".

On May 7, 1964, the District Court (Judge Roger D. Foley) ruled on the matters heard on March 9th and 26th,

1964, relative to Foster's Petition to enjoin Bratrud. The Court in its findings held that the Bratrud Pathology Contract of October 25, 1962, was a valid and subsisting agreement. The Court by its Order vacated the Temporary Restraining Order and denied the Preliminary Injunction. (Appendix Item VI). Evidently Bratrud had not advised the Judge that his Pathology Contract had been assigned by him to Dr. Davison on April 28, 1964.

On May 11, 1964, the Court entered its "Order Approving Creditor's Petition for Reorganization of Maryvale Community Hospital, Inc. Under Chapter X". Roland Wilpitz was appointed Trustee and there was an Order of Reference to Referee Russell B. Taylor as Referee and Referee as Special Master.

On June 15, 1964, Receiver Foster's Final Account and Report and Petition for Allowance was filed.

On July 6, 1964, the Court entered its Order accepting resignation of Roland Wilpitz as Trustee and appointing Frank J. Dunning, Respondent herein, as Trustee.

On July 23, 1964, the Court entered and filed its Order of Reference to Referee Taylor as Special Master to hear and report upon the issues presented by the Final Account, Report and Petition for Allowance of Fred Foster, Receiver.

On July 24, 1964, Trustee Dunning petitioned for an Order to Show Cause why the alleged Executory Contract (Pathology Contract of October 25, 1962 between Maryvale Community Hospital, Inc. and Bratrud) should not be terminated pursuant to § 116(1) of Chapter X and why Bratrud should not be deemed a creditor for his damages as may be shown the Court by virtue of the rejection of the alleged Executory Contract and submit to the Court a verified accounting for monies received and expended by

Bratrud pursuant to the terms of the Contract. (Appendix Item VII).

On July 24, 1964, the Court entered an Order to Show Cause against Bratrud why the alleged Executory Contract of October 25, 1962, should not be rejected and why he should not file an accounting. The Order provided that if the alleged Executory Contract was rejected Bratrud be permitted to present a claim for injuries resulting therefrom and that Bratrud be deemed a creditor of the estate in such amount as the Court found proper on further hearing. (Appendix Item VIII). The matter was set to be heard before Judge Foley on August 3, 1964.

On July 27, 1964, Bratrud filed Exceptions to the Foster accounting and report and petitioned for an Order to Show Cause for Reclamation of Trust Funds or In the Alternative, Approval and Payment of Priority Claim as Expense of Administration in the sum of $30,470.95, as sums due him pursuant to the Pathology Contract for the period of August 1, 1963 through April 30, 1964, and to the date of the Petition, verified on July 15, 1964. (Appendix Item IX). A statement of the account to date prepared by George A. Shepard, C.P.A. was attached as an exhibit thereto to support the Bratrud claim.

On August 3, 1964, the hearing on the Dunning Petition for Rejection of Bratrud's Contract and for an accounting (Appendix Item VII), and the Bratrud Petition for Approval and Payment of Priority Claim (Appendix Item IX) were heard. The hearing scheduled by Judge Foley's Order of July 24, 1964 (Appendix Item VIII) provided for hearing before Judge Foley. For some reason which does not appear from any portion of the record the hearing was conducted before Russell B. Taylor as Referee and Special Master rather than before Judge Foley. No one objected! The matter covered by the Bratrud Petition had been

referred to Referee and Special Master Taylor on July 21, 1964 and there is no record of the Referee having set a date for a hearing thereon. Nevertheless the matter subject of Bratrud's Petition (Appendix Item IX) referred to the Special Master and Referee Russell B. Taylor and the Dunning Petition to Reject the Executory Contract of Bratrud (Appendix Item VII) set to be heard by the Judge were heard on August 3rd and 4th, 1964 by Russell B. Taylor, Referee and Special Master. No one objected to the Referee and Special Master hearing the Petition to reject the Bratrud contract nor did Bratrud inform anyone that he had sold and assigned the Contract.

On August 11th, 1964 Referee Taylor issued an Order permitting Dunning to reject the alleged Executory Contract between the Debtor and Bratrud, without prejudice to Bratrud to present to the Court a claim for injuries resulting from rejection of the alleged Contract. The Order further provided that Bratrud be deemed a creditor of the estate in such amount determined proper by the Court on further hearing.

Bratrud has never objected to this Order by the Referee or to any Orders made by the Court or the Referee until the filing of the Appeal. The Ninth Circuit Court in its opinion ruling on Bratrud's Appeal (Appendix Item XII) at Page 3 noted that: —

> "On August 11, 1964 an order was entered which permitted the trustee to terminate the contract, effective August 3, 1964 and, pursuant to Section 202, authorized Dr. Bratrud to present such claims for damages as he might suffer as a result of the rejection of the contract. The order provided that he be deemed a creditor in such amount as the court may subsequently determine. *Dr. Bratrud at no time objected to the order permitting Trustee Dunning to reject the contract.*" (Our emphasis)

(See Appendix Item X for Order of August 11th, 1964).

On January 27, 1965, Referee Taylor issued his Findings of Fact and Conclusions of Law (Appendix Item XI) relating to the Bratrud accounting, asked for by Dunning, and the Petition for Reclamation by Bratrud which were heard on August 3rd and 4th, 1964, together with the Petition to reject the Executory Contract.

The Referee found Bratrud was employed by the Debtor in accordance with the terms of the Pathology Contract of October 25, 1962 for the period of August 1, 1963 to and including April 30, 1964; that Receiver Foster failed to honor or observe the terms of the Agreement or permit Debtor to fulfill or comply with them, and that there was, after all adjustments and offsets the sum of $30,543.60 due Bratrud for the period of August 1st, 1963 through April 30th, 1964, with 6% interest on the sums after April 30, 1964, until paid.

On February 15, 1963, the Order of the Referee and Special Master was filed directing the Trustee Dunning to pay Bratrud the sum of $30,543.60 as administrative costs of the State and Federal Court Receiverships, in accordance with the Findings and Conclusions. This Judgment and Order was not objected to or appealed and Dunning subsequently paid the sum of $30,543.60 to Bratrud. Bratrud did not apply for leave to sue the State Court Receiver for breach of contract following Judge Foley's earlier direction that such Petition should be filed independently. (Appendix Item III).

The Appellate Court in its opinion (Appendix Item XII) at page 4 noted in reference to the Orders heretofore described, that: —

> "14. All of the preceding judgments and orders have become final."

At a later hearing on May 25, 1966, Bratrud filed a Petition for Order to Show Cause why Dunning should not

pay damages for rejection of Executory Contract, (Appendix Item XIII), still maintaining the position that he had a viable contract on August 11, 1964, when it was rejected.

This document (Appendix Item XIII) is particularly interesting in consideration of Bratrud's Petition for Certiorari. The Petition does not disclose that he had assigned the Contract to Dr. Davison prior to Referee Taylor's orders (Appendix Items X and XI) permitting its rejection; it does not question or object to the Referee's right to order the rejection of the alleged Executory Contract and it prays for damages because of the rejection! Now some six years later in his (Bratrud's) Petition for Certiorari after failure of his scheme to get damages for rejection of his alleged Executory Contract, he feels the United States Supreme Court should rule on the question of whether the Referee was empowered to reject an Executory Contract under § 116(1).

That question should have been raised at the time of the hearings on the matter before Referee Taylor on August 3rd and 4th of 1964.

Bratrud either was unaware of the Rule under § 116(1) Chapter X, requiring matters reserved to the Judge to be heard by the Judge or intentionally chose to use the alleged rejection of contract as a means of benefit to himself by claiming damages therefor. In his Petition for damages (Appendix Item XIII) he makes no assertion that he has a claim for damages as a result of being coerced into assigning his contract!!

On May 31, 1966, the matter of the Bratrud Petition for Damages for Rejection of Executory Contract was referred to Referee Taylor and on June 8, 1966, Referee Taylor issued an Order directing Dunning to show cause why Bratrud's damages should not be fixed and paid out of the Debtor assets as a creditor by virtue of rejection of

an Executory Contract. (Appendix Item XIV). The Order to Show Cause was prepared by Counsel for Bratrud as appears from the document itself.

Shortly thereafter Trustee Dunning filed a Motion to Quash the above-described Order to Show Cause. (Appendix Item XV).

The Motion to Quash gave as one of the reasons for quashing the Order to Show Cause the fact that upon information and belief the alleged contract had been assigned by Petitioner Bratrud *prior* to the time for which Bratrud sought compensation.

On June 29th and 30th the matter came on for hearing before Referee Taylor. Both sides introduced evidence that was admitted and presented witnesses who testified. (See Appendix Items IV and V). Testimony showed that Bratrud assigned the contract in question to Dr. Davison on April 28, 1964; that he was paid $30,000.00 by Dr. Davison and that Dr. Davison assumed debts of Bratrud's pathology laboratory in the amount of several thousand dollars (approximately $26,000.00).

Following the hearings of June 29/30, 1966, no item concerning the Bratrud Petition for Damages for Rejection of An Executory Contract appears of record until February 8, 1968, at which time Bratrud filed proposed Findings and Conclusions on the question of "Liability of the Trustee for Damages for Breach of Executory Agreement." The Referee never adopted Bratrud's proposed findings.

On April 19, 1968, Referee Taylor held another hearing on the matter. No evidence or testimony was given. The Referee only heard argument of counsel.

On the 18th day of September, 1968, Referee Taylor entered his Findings of Fact, Conclusions of Law and Judgment on the Bratrud/Dunning matter. (Appendix Item XVI). The Judgment quashed the Order to Show Cause issued pursuant to Bratrud's Petition. (Appendix Item XIII).

The Referee in his Findings held that on April 28, 1964, Bratrud voluntarily assigned all of his right, title and interest in the Executory Contract of October 25, 1962 to Dr. Judson A. Davison; that on April 30, 1965, Bratrud wrote Dunning advising that the contract had been terminated by mutual consent, and that neither Bratrud nor the Debtor terminated the Agreement of October 25, 1962, prior to its total assignment to Dr. Davison on April 28, 1964.

The Referee concluded that as of August 11, 1964, the date of its rejection as an "alleged" contract, Bratrud had no right, title or interest in the contract and could not have been and was not damaged by its rejection. On September 27, 1968, Bratrud filed a Petition for Review.

On October 16, 1968, Dunning filed a Motion to Dismiss Bratrud's Petition for Review and to Affirm the Referee's Judgment, Findings of Fact and Conclusions of Law, dated September 18, 1968.

The District Court held no hearing on the Bratrud Petition for Review or the Motion of Dunning to Dismiss the same. Other memoranda were filed by the parties. On August 18, 1969, the District Judge issued an Opinion and Order rejecting certain findings of the Referee and found that the Co-Receivers (Receivers in the State Court proceeding) breached the Bratrud contract on October 25, 1962, and its Assignment to Davison was *involuntary*, a result of economic duress exerted by the Co-Receivers and that as a result the Hospital was bound to pay damages to Bratrud in an amount equal to six times the "average monthly reimbursement by the Hospital to Bratrud during the year preceding the termination of the pathologist" or $15,000.00 per month for six months. Bratrud was directed to submit a form of Judgment in accordance with the Opinion.

On August 22, 1969, the District Judge entered its "Judgment against Frank J. Dunning, as Trustee of said Debtor and Good Samaritan Hospital." Good Samaritan Hospital

had never been a party to the Bratrud/Dunning proceedings under § 116(1) (11 U.S.C. § 516(1))!!

The Judgment was for $90,000.00 as liquidated damages for the breach of the Bratrud contract with Maryvale Community Hospital, Inc., with interest at the rate of six percent (6%) from August 1, 1963, the date of the original Involuntary Petition for Reorganization of Debtor under Chapter X plus Bratrud's costs of action in the amount of $341.60.

The Order vacated and set aside the Judgment of Referee Taylor dated April 18, 1968. The Order evidently referred to Referee Taylor's Order of September 18, 1968, (See Appendix Item XVI) as there was no Order of April 18, 1968.

On August 29, 1969, Dunning and Good Samaritan Hospital both filed Motions to vacate the Judgment, Opinion and Order of the District Court as set forth above, and for a hearing or a new trial. By this time the proceedings had taken on a most extraordinary character with a judgment against a non-party for a tort claim that had never been tried!!

On October 6, 1969, a hearing was held before the District Court on the Motion of Good Samaritan Hospital and Dunning. The Court granted Good Samaritan's Motion to vacate the Judgment as to them. Bratrud and Dunning were given leave to file simultaneous memoranda by October 17, 1969, at which time the matter would be set for further hearing. The parties each submitted additional memoranda.

The matter came on for hearing again on November 10, 1969, before the District Court.

On November 19, 1969, the District Court entered and filed its amended Judgment (Appendix Item XVII) in favor

of Bratrud and against Dunning as Trustee of the Debtor's estate in the sum of $90,000.00 as liquidated damages for breach of the Bratrud contract with Debtor, together with interest at the rate of six percent (6%) from August 1, 1963, the date of the original Involuntary Petition for Reorganization of Debtor plus Bratrud's cost in the amount of $341.60. The Order further vacated and set aside the Judgment of Referee Taylor of April 18, 1968. (As noted before Taylor's Order was dated September 18, 1968). The Court's opinion upon which the Order is based is set forth in Appendix 4 of Petitioner Bratrud's Brief herein as well as Appendix Item XVIII hereof.

The amended Judgment and the Opinion and Order on which it is based were the subject of Trustee Dunning's Appeal to the Ninth Circuit.

The Ninth Circuit after hearing the Appeal ruled in favor of Dunning and against Bratrud. (Appendix Item XII).

Bratrud petitioned for a rehearing which was denied.

Following denial of the rehearing, Dr. Bratrud petitioned this Court for Writ of Certiorari to the Ninth Circuit Court. This pleading is Dunning's Response thereto.

ARGUMENT BY RESPONDENT IN OPPOSITION

Petitioner has properly stated that the correct construction of § 116(1) of Chapter X does not empower the Referee or Special Master to reject an Executory Contract. § 117 of the Bankruptcy Act permits the Referee to hear all matters not reserved to the Judge. Granting permission to reject an Executory Contract is reserved to the Judge. This fact would not affect the outcome of this case as Petitioner had no contract at the time it was rejected, having assigned it to a third party prior to its rejection under § 116(1).

His subsequent claim for damages under § 202 of Chapter X was properly disallowed by the Appellate Court's rever-

sal of the District Court's judgment. Bratrud's petition for writ of certiorari on the basis of alleged error of the Appellate Court fails to disclose that the proceeding under § 116(1) was by his own choice!

The Petitioner had sold and assigned his Executory Contract to Dr. Davison on April 28, 1964, about thirteen days prior to the appointment of a Trustee for the Debtor. The Trustee had no knowledge of the Assignment and in July of 1964 filed a Petition to reject the contract. (See Appendix Items IV, V and VII).

The hearing was set to be heard by the Judge on August 3, 1964.

Other matters initiated by the Petitioner and a Fred Foster, Receiver of Debtor prior to the appointment of a Trustee, were scheduled to be heard on the same date before Referee Taylor as Referee and Special Master.

It does not appear from any portion of the record why both the Trustee's Petition to Reject Bratrud's Executory Contract and the matters subject of Receiver Foster's Petition and Bratrud's objection and other Petitions were heard before the Referee and Special Master Taylor, but they were.

Bratrud made no objection to having the matter of the rejection of his contract pursuant to § 116(1) heard by Referee Taylor and he did not disclose to Referee Taylor or Respondent Dunning that in fact he had assigned his Contract to Dr. Davison and there was no Contract to reject!

As a result of the hearings before Referee Taylor on August 3rd and 4th, 1964, Bratrud was awarded $30,543.60 from Debtor for services under his Contract through April 30th (all he had petitioned for); the Trustee was permitted to reject his Contract, not knowing Bratrud had already sold and assigned it to a Dr. Davison and Bratrud was authorized to assert a claim for damages for the rejection

of the Contract and be deemed a creditor of the Debtor's estate therefor. (See Appendix Items X and XI).

On March 9th, Bratrud had filed a Petition to Sue Receiver Foster for Foster's acts in enjoining him from the use of the pathology laboratory. (See Item II of Appendix). On March 26th at the hearing on Foster's proceeding to enjoin Bratrud before Judge Foley, the Petitioner, Bratrud, asked Judge Foley if the Court would require an additional "Petition for Leave to Sue Receiver Foster". (See Appendix III). Judge Foley replied that it would be treated independently. Bratrud never pursued the matter.

Thus we see that in March of 1964, Bratrud conceived that he had a tort claim against Receiver Foster for keeping him out of his pathology laboratory. In March Bratrud also petitioned the Court for reimbursement by the Trustee for the use of his laboratory and in April, he sold the laboratory and assigned his Executory Contract to Dr. Davison, but did not disclose this fact to the Court or the Trustee! He subsequently, as has been shown, received and was paid both his claim against the estate for $30,543.60 for use of the laboratory through April 30, 1964, as well as the very substantial proceeds of his sale of the laboratory and assignment of the Contract to Dr. Davison on April 28, 1964.

Despite these notable results Bratrud had gained an additional right and that was to be "*permitted to present to this (District) Court such claim or claims for injuries as may result from the rejection of the alleged executory agreement, and may be deemed a creditor of the estate in such amount as shall be determined proper by this Court on further hearing of the matter.*" This is quoted directly from Referee Taylor's Order of August 11, 1964. (Appendix Item X).

On May 25th, 1966, Bratrud petitioned the Court for an "*Order to Show Cause Why Trustee Should Not Pay Dam-*

ages for Termination of an Executory Contract". (Appendix Item XIII) The Court issued the Order to Show Cause (Appendix Item XIV). In the pleading Bratrud in no manner discloses that he had assigned the Contract to Dr. Davison on April 28th, 1964. In this pleading, Bratrud relies specifically on Referee Taylor's Order of January 27th, 1965, (Appendix Item XI) and goes on to allege that pursuant to this Order, the Contract was terminated on August 3rd, 1964. In May of 1966, Bratrud was still proceeding under §§ 116(1) and 202 of Chapter X and was not asserting a tort claim against the Receiver Fred Foster.

Respondent Dunning moved to Quash the Order to Show Cause (Appendix Item XV) and gave as one of the grounds that "upon information and belief that the alleged contract of October 25th, 1962, was assigned by Petitioner (Bratrud) prior to the time for which he seeks compensation and therefore has no rights under it."

Referee Taylor heard the Bratrud claim and Dunning's objections thereto on June 29th and 30th, 1966.

The Referee made no Orders in the matter of Bratrud's Petition for Damages for Rejection of an Executory Contract prior to April of 1968, and the matter appears to have lain dormant for almost two years.

On April 19, 1968, Referee Taylor had another hearing on the Bratrud Petition for Damages for Rejection of an Executory Contract and Respondent Dunning's Motion to Quash the Order to Show Cause issued thereunder.

On September 18th, 1968, Referee Taylor entered his Findings of Fact, Conclusions of Law and Judgment Quashing the Order to Show Cause issued pursuant to Bratrud's Petition for Damages for Rejection of a Contract under § 116(1) and § 202 of Chapter X (Appendix Item XVII).

The Referee in his findings held that Bratrud voluntarily assigned his Contract on April 28, 1964, to Dr. Davison,

and that at the date of its alleged rejection, Bratrud had no interest in it and could not be damaged. Bratrud petitioned for review of the Referee's Order.

On review, the District Court issued an Opinion and Order and a Judgment which is set forth in the Appendix Items XVII and XVIII.

The District Court's judgment gave Bratrud a judgment for a tortious breach of contract resulting from coercive tactics of Receiver Foster.

Strangely enough, Bratrud, having elected not to press the remedy he conceived he had against Receiver Foster in 1964, succeeded in convincing the District Court that an assignment of his contract, which he concealed from the Court from April 28, 1964 until the hearing on Dunning's Motion to Quash (Appendix Item XV) filed on June 29th, 1966, was coerced and that his Petition for Damages for Trustee's rejection of the Contract entitled him to a remedy in tort. He converted a summary proceeding under § 116(1) into a plenary action on a tort claim. *Throughout the entire proceedings he relied on 116(1) and 202 without objection. Now he seeks to charge the Court of Appeals with error for treating his acts in the same manner as he did until his Petition for certiorari!*

Bratrud by this Judgment was raised from a general creditor of the estate, the status to which he is entitled under §§ 196, 197 and 202 of Chapter X, to that of a Judgment Creditor with an administrative claim.

Following the issuance of the District Court's Judgment and Opinion, Dunning appealed to the Ninth Circuit. On February 11th, 1972, the Ninth Circuit reversed the District Court.

Bratrud, in his Petition for Certiorari, relies on the fact that all of the proceedings were initiated and pursued on two erroneous premises, one of which he had knowledge of

and the other an error of law to which he acquiesced and sought to profit!

The latter error of law lay in the fact that only the Judge and not the Referee may grant an Order permitting a Chapter X Trustee to reject an Executory Contract.

It is extremely unlikely that any of the parties or the Court (Referee, District Judge or Appellate Judges) was aware of the error committed on August 3rd, 1964, when the Referee, not the Judge, heard and ruled on a Petition to reject an Executory Contract under § 116(1).

The Appellate Court in its opinion (Appendix Item XII) held that all preceding judgments (i.e., prior to February 9, 1965) had become final. Petitioner Bratrud does not directly challenge this holding but we assume that under Supreme Court Rule 23(c), this question can be considered a subsidiary question.

The first error adverted to above, of which Bratrud had knowledge, was an error of fact which Bratrud either intentionally or negligently failed to disclose and that is the fact that at the time, August 3, 1964, the Referee heard the Petition to Reject the Bratrud contract, however erroneous or improper the Referee's act might be, there was in truth and fact no Executory Contract to reject! Bratrud had assigned it to Dr. Davison on April 28th, 1964, some three months prior to the purported rejection of the alleged contract!

The opinion and Order of the Ninth Circuit (Appendix Item XII) against which the Bratrud Petition for Certiorari is directed does not rely solely on § 116(1). The Court stated:—

> "The district court improperly turned a hearing on a claim for damages for judicial rejection of the contract into a judgment against the trustee by reason of tortious conduct of the receiver.

> The question of what motivated Dr. Bratrud to assign his contract is irrelevant for the purpose of determining damages for an authorized rejection. *No section of the Bankruptcy Act has been cited to this court which provides that an involuntary transfer may be disregarded in a proceeding for damages for a Section 116(1) contract rejection.* Such a rule could lead to the inequitable situation where two claimants seek damages for rejection of a contract by a trustee to result in damages for assigned sequentially and for valuable consideration between them." (Our emphasis).

The Court decision is based on the fact that there is no provision in the Bankruptcy Act which provides that an involuntary transfer of a contract may be disregarded in a *proceeding for damages under § 116(1).*

Regardless of whether or not a Referee had the right to authorize a Chapter X Trustee to reject an Executory Contract, the Petitioner, Bratrud, chose to use the § 116(1) proceeding as the vehicle to assert a claim for damages for rejection of an Executory Contract when he no longer was a party thereto. As the Ninth Circuit noted above, there is no statute which permits a transfer of a contract to be disregarded. The Petitioner Bratrud has never claimed that the proceeding was not a proceeding under § 116(1). He only says it was error to use the proceeding because he lately discovered it was erroneous.

The Appellate Court in reversing the judgment of the District Court concluded:—

> "Although bankruptcy proceedings are equitable in nature, equity cannot be stretched to the point of *permitting a proceeding for damages cause by the rejection of a contract by a trustee to result in damages for alleged tortious conduct while the contract was in effect.*
>
> The judgment is reversed and the cause is remanded to the district court with directions to issue its

judgment affirming the order of the referee." (Our emphasis)

The Appellate Court, like Bratrud, finds that proceedings under § 116(1) were improper. They hold the proceeding cannot be used in a proceeding for damages for tortious breach of contract.

Bratrud holds the error was because the 116(1) proceedings, even when used by him over a period of almost eight years, were in error.

Bratrud in his Petition for Certiorari, states:—

> "In reliance upon what it conceived to be an 'authorized' rejection of petitioner's executory contract, the Ninth Circuit *has sanctioned the power to reject executory contracts by the Referee* in bankruptcy contrary to the plain language of § 116(1) and the duty inclusively vested in the District Judge to do so upon appropriate request. The order of court entered on August 11, 1964, repeatedly referred to and relied upon in the decision, as effecting the rejection of Dr. Bratrud's contract, was presented to, and signed by, Russell B. Taylor, Referee in bankruptcy (Appendix A1-A2). The executory contract was not rejected by order of the District Judge as required by § 116(1) even though this prerequisite is noted in the decision at 456 F.2d 417, but utterly ignored by the Court." (Our emphasis)

The Court did not "utterly ignore" the requirements of § 116(1), nor did it sanction the power to reject an executory contract by a Referee contrary to § 116(1). It was unaware of the fact that the Referee and not the judge had granted the Order permitting rejection of the Bratrud Executory Contract. The Court was well aware of the law and properly stated the law.

The facts, buried in over 1,300 pages of pleadings in the record before it, and over 500 pages of Transcript and evidence that was part of the record, were known to the parties and their counsel but not to the Judges of the Appellate Court unless it was called to their attention!!

Bratrud, above all, having concealed the fact that he assigned his contract before it was rejected, should not be heard to complain that another fact as to which arm of the Court ruled on the matter, was not known to the Appellate Court, should be grounds for granting certiorari.

He, Bratrud, knew the fact as he or his counsel were present throughout all the proceedings.

CONCLUSION

Bratrud has entirely misconstrued the Order and Opinion of the Appellate Court for the Ninth Circuit.

The Court *did not* sanction the right of a Referee to reject an Executory Contract under § 116(1) of Chapter X.

The Court held that a proceeding under § 116(1) for damages caused by rejection of a contract by a Trustee cannot be allowed to result in damages for alleged tortious conduct while the contract was in effect.

Whether the proceedings under § 116(1) was proper or was not proper is not material to the ruling of the Appellate Court. The fact remains that the proceeding was initiated and pursued under § 116(1) and the Petitioner Bratrud was well satisfied with the results until the Appellate Court quite properly held that a summary proceeding under §§ 116(1) and 202 of Chapter X for rejection of an Executory Contract and damages therefrom cannot be transmuted into a plenary action for a tort claim for a Receiver's alleged tortious conduct while the contract was in effect.

Moreover, since the Petitioner Bratrud had sold and assigned the contract prior to the time it was rejected the Trustee could not possibly have rejected it and the following proceedings under §§ 116(1) and 202 were in reality a nullity.

The Referee quite properly found this to be true when he quashed the Order to Show Cause issued pursuant to Bratrud's Petition for Damages for rejection of his Executory Contract.

Bratrud's question for review based on the applicability of Rule 53(e)(2) of *Federal Rules of Civil Procedure* has no bearing on the instant situation.

For the reasons herein set forth, the Court should deny Bratrud's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

Supreme Court, U. S.
FILED
AUG 23 1972
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1972

No. 72-143

In the Matter of
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,
Debtor.

THEODORE E. BRATRUD,
Petitioner,

vs.

FRANK J. DUNNING, as Trustee of the Estate of Maryvale Community Hospital,
Respondent.

Appendix in Support of Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IV	Copies of Documents and letters admitted in evidence at hearing on June 29, 1966, before Referee, the Hon. Russell B. Taylor on various matters and in particular, the Petition of Bratrud for Damages Under § 116(1) for Rejection of Executory Contract and Trustee Dunning's Objection thereto and Motion to Quash the Order to Show Cause Issued Pursuant to Bratrud's Petition—	
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Appendix I(a)
(R55-62)

In the District Court of the United States for the District of Arizona

No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc.,
Debtor.

PETITION OF RECEIVER FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

To the Honorable Roger D. Foley, Jr., Judge of the District Court of the United States for the District of Nevada and Specially Assigned This Matter in the District of Arizona.

COMES NOW FRED FOSTER, the duly appointed, qualified and acting receiver herein and respectfully alleges to the court:

1. That heretofore on November 26, 1963 your petitioner was, by an order of this court, appointed receiver in the above-entitled and numbered cause. That immediately thereafter, your petitioner assumed his duties as such receiver and has acted continuously thereafter in this capacity. That prior to the appointment of your petitioner as receiver in the above-entitled cause, your petitioner was a co-receiver in a proceeding in the Superior Court of the State of Arizona in Cause No. 151970 and has acted in that capacity from July 31, 1963 up to his appointment in this cause. That during the time your petitioner was a co-receiver for the

Superior Court in Cause No. 151970 there arose a dispute between co-receivers and Theodor E. Bratrud, M.D., regarding the pathology laboratory and the services performed by the pathologist, Theodor E. Bratrud. This dispute concerned the termination of the contract for pathology services with Theodor E. Bratrud; an accounting of funds paid to the pathology laboratory and Dr. Theodor E. Bratrud, together with an accounting of funds spent by Doctor Bratrud and the pathology laboratory; an accounting of equipment purchased by the Hospital and/or the pathologist and located in the pathology laboratory; an assignment by Theodor E. Bratrud of his pathology contract to another party; the relationship of the medical staff of the Hospital and the pathologist, Theodor E. Bratrud, see exhibit "A" attached hereto and by reference made a part hereof, and various other matters relating to the performance of pathology services and the functioning of the pathology laboratory.

2. Your petitioner has been informed by the Hospital administrator and the Director of the pathology laboratory that certain equipment has been removed from the pathology laboratory and that some or all of such equipment has not been returned to the laboratory. Your petitioner has been advised that certain financial obligations regarding the purchase of equipment for use in the pathology laboratory are in default and that Doctor Theodor E. Bratrud has not taken any steps to remedy such default; a levy by the United States Department of Internal Revenue has been made upon the Hospital because of the failure of the laboratory to transmit certain withholding taxes to the United States Internal Revenue Department. Your receiver is informed and believes and therefore alleges that the presence of Doctor Theodor E. Bratrud in and about the Hospital premises and the pathology laboratory interferes

with the operation of the Hospital and the laboratory by interfering with the performance of duties by personnel in the laboratory; interfering with the nursing staff; disrupting procedures initiated by doctors or other persons employed in the Hospital or laboratory; utilization of Hospital and/or laboratory equipment for purposes which are not in the best interests of the Hospital, and otherwise interfering with the administration of the Hospital and the performance of the duties of your receiver. Such actions on the part of Theodor E. Bratrud tend to reduce the Hospital occupancy; cause a lack of confidence between the medical staff and the Hospital administrator; cause a lack of confidence between the medical staff and services rendered by the pathology department and otherwise prevent the Hospital and the pathology laboratory from operating in a more efficient manner and thereby obtaining more revenue from its operations. See Exhibit "B" attached hereto and by reference made a part hereof. Your receiver is informed and believes and therefore alleges that the medical staff of MARYVALE COMMUNITY HOSPITAL, INC. deem it in the best interests of the Hospital and its future operations that Theodor E. Bratrud be immediately and permanently excluded from the Hospital and the pathology laboratory premises. See Exhibit "C" attached hereto and by reference made a part hereof.

3. In the interest of preserving and protecting the operation of the Hospital and the pathology laboratory; protecting the property located in the Hospital and the pathology laboratory and to insure the orderly functioning of the Hospital and the Pathology laboratory, your receiver has directed the Hospital administrator to change all locks or other means of securing the pathology laboratory premises until further notice and has further instructed the Hospital administrator to temporarily impound and hold funds for

out-patient services performed by the pathology laboratory and paid to the Hospital.

WHEREFORE, your petitioner prays that:

1. The court forthwith issue a temporary restraining order restraining and enjoining Theodor E. Bratrud from entering upon the pathology laboratory or MARYVALE COMMUNITY HOSPITAL, INC. premises; from doing or performing any activities, functions or actions in and about the Hospital or pathology laboratory or from otherwise interfering with the effective and efficient operation of the pathology laboratory; the Hospital; the administrator and his staff; the professional services rendered by members of the medical staff and the duties and functions of your receiver. That the court issue an order to show cause directed to Theodor E. Bratrud to appear and show cause at a time and place certain why a preliminary injunction should not be ordered restraining and enjoining Theodor E. Bratrud from doing or performing any activities, functions or actions in and about the Hospital or pathology laboratory or from otherwise interfering with the effective and efficient operation of the pathology laboratory; the Hospital; the administrator and his staff; the professional services rendered by members of the medical staff and the duties and functions of your receiver.

2. For such other and further relief as the court may deem just and proper in the premises.

SHIMMEL, HILL, KLEINDIENST & BISHOP

By: /s/ DONALD D. MEYERS
Donald D. Meyers
1212 Union Title Building
222 North Central Avenue
Phoenix, Arizona

Attorneys for the receiver and
petitioner herein, FRED FOSTER

STATE OF ARIZONA
COUNTY OF MARICOPA—ss.

FRED FOSTER, after being first duly sworn upon his oath, deposes and says:

That he is the receiver of MARYVALE COMMUNITY HOSPITAL, INC., in the above-entitled and numbered cause and that he has read the petition and knows the contents thereof and that the allegations contained therein are true and correct to the best of his information, knowledge and belief.

/s/ FRED FOSTER
Fred Foster

SUBSCRIBED and sworn to before me this 13 day of February, 1964.

/s/ ELIZABETH CANANAF
Notary Public

My Commission Expires:
11/6/1966

EXHIBIT "A"

September 17, 1963
General Staff Meeting
46 Staff members present
P. L. Powell, Administrator
Fred Foster, Co-Receiver

Dinner was served by the auxiliary following which the meeting was called to order by Dr. Kennedy.

It was moved and seconded that the reading of the minutes of the previous staff meeting be dispensed with. This was approved.

The minutes of the Executive Committee of 9/3/63 were read and approved as read. Several vital points of this meeting were stressed by Dr. Kennedy. (minutes attached)

Mr. Powell was introduced by Dr. Kennedy to discuss anything that the administration wished. He stated that the problem of the PBX being slow to answer was unavoidable since it is a one place board but welcomed suggestions for improving the service.

He announced that he had investigated the availability of a defibrillator and cardiac pacemaker for the E.R. He stated that these instruments had been available for two years but that they were out of order and that repairs would be made.

Dr. Howard Erickson then presented the Scientific Program "The Treatment of Allergy in General Practice."

Dr. Kennedy then called for an executive session consisting of members of the Active staff only. A list of Active Staff was read by the secretary. He read a letter in answer to the resolution passed by the staff that staff status should be determined by the members of the staff only. The letter pointed out that this resolution was illegal as the Board of Directors under the law and also under the By-laws of the hospital staff are solely responsible for appointment or termination of staff status.

Mr. Fred Foster was introduced as one of the co-receivers of the hospital. He discussed briefly some of the groups interested in obtaining the hospital, etc. He also requested that the staff should make known its opinion of the professional contracts of the hospital, and whether or not these should be continued; specifically the Pathology and Radiology contracts. A discussion regarding these contracts was held following which a secret ballot was taken regarding each of these contracts.

The specific question was to express a vote of confidence in the manner in which these departments have functioned. The vote was:

Pathology			Radiology	
Yes 13	No 22	Abst. 1	Yes 32	No 4

Dr. Saba reported on his committee's questionnaire to the staff. See attached committee report.

There being no further business, the meeting adjourned.

/s/ James Gilbert, M.D.
James Gilbert, M.D.
Secretary-Treasurer Medical Staff

EXHIBIT "B"

Maryvale Community Hospital Inc. [Letterhead]
5102 West Campbell Avenue
Phoenix 31, Arizona
939-6511
February 12, 1964

Mr. Fred Foster
Co-Receiver
Maryvale Community Hospital Inc.

Dear Mr. Foster:

This is a formal request, on my part, that you attempt to receive some relief through the Honorable Judge Foley.

The delay in obtaining complete separation of Doctor Theodore Bratrud from any connection with this hospital is becoming a grievious situation. His constant interference with the present pathologist coupled with the attitude of the medical staff is endangering the operation of this hospital.

Aside from his interfering with the nursing staff and by his very presence, which is completely repugnant to the medical staff, there are several salient facts which are indisputable. Doctor Bratrud was voted off the staff of this hospital by virtue of a vote of "no confidence" by the medical staff. Doctor Bratrud has also been "blackballed" by the Board of Censors of the Maricopa County Medical Society and has been denied membership in this professional group. Doctor Bratrud has been denied entry to this hospital by myself because of his lack of status and interference in hospital routine; however, he still frequents the laboratory; disrupts their procedures; utilizes hospital personnel for his personal business.

The Executive Committee of the Medical Staff of this hospital has met frequently in an effort to arrive at some conclusion, method, or procedure in order to protect themselves and their patients from this Doctor's interference.

It is a legally accepted fact that a Board of Trustees or Board of Directors is morally and legally responsible for the hospital. In our particular instance this burden has passed to you as the Co-Receiver. Therefore, it is respectfully requested that you, through the Attorney for the Receiver, petition Judge Foley for assistance in relieving a very volatile and potentially dangerous circumstance.

Yours truly,

/s/ Preston L. Powell
Preston L. Powell
Administrator

cc: Chief of Staff, P. H. Lahr, M.D.
President Board of Directors, John F. Long

EXHIBIT "C"

Maryvale Community Hospital Inc. [Letterhead]
5102 West Campbell Avenue
Phoenix 31, Arizona
939-6511
February 12, 1964

Mr. Fred Foster
Co-Receiver

Dear Sir:

We, the Executive Committee, of the Maryvale Medical Staff of the Maryvale Community Hospital, Inc., respectfully request that the services of Dr. Theodore E. Bratrud be discontinued at this hospital immediately.

This is very necessary since the proper treatment and care of every patient admitted to the hospital depends upon the meticulous functioning of the Pathology Department and the professional judgment of its director.

The continued approval of this hospital by the Accreditation Committee of the American Medical Association and American Hospital Association, the continued approval depends, amongst other things, upon the proper supervision and functioning of the Pathology Department so that clinical credence can be placed in the work which is done there and therefore on the proper application of this to the patient's treatment needs. Also, at a General Medical Staff meeting on September 17, 1963 Dr. Bratrud received a vote of "no confidence" by the medical staff. Dr. Bratrud is no longer a member of this medical staff and is not a member of the Maricopa County Medical Society or the Arizona State Medical Society and there-

fore we feel that his services should be immediately and permanently discontinued at this hospital and that his presence in the hospital or in the Pathology Laboratory should be excluded.

Very truly yours,

MEMBERS EXECUTIVE COMMITTEE:
CHIEF OF THE MEDICAL STAFF:

Appendix I(b)

(R 63-65)

In the District Court of the United States for the District of Arizona

In the Matter of
Maryvale Community Hospital, Inc.,
Debtor.

No. B-9352-Phx.

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

A verified petition having been presented to the court wherein the issuance of a temporary restraining order against Theodor E. Bratrud is requested and it appearing from the said petition that the activities, functions or actions of Theodor E. Bratrud in and about the Hospital or pathology laboratory are interfering with the effective and efficient operation of the pathology laboratory; the Hospital; the administrator and his staff; professional services rendered by members of the medical staff and the duties and functions of the receiver and further that the interference with the orderly functioning and operation of the Hospital and pathology laboratory has and may continue to reduce its income and that the property located in the Hospital or pathology laboratory premises may be removed or damaged and that the debtor herein, because of the aforesaid, will suffer a loss of earnings; a reduction in the value of its assets for which there will be no adequa remedy at law and good cause appearing for the issuance of this restraining order,

It Is Hereby Ordered, Adjudged and Decreed that Theodor E. Bratrud, except as hereinafter provided, be and he

is hereby temporarily restrained from entering upon or occupying the pathology laboratory or MARYVALE COMMUNITY HOSPITAL, INC. premises or any part thereof; from doing or performing any activities, functions or actions in and about the MARYVALE COMMUNITY HOSPITAL, INC., or its pathology laboratory and from otherwise interfering with the effective and efficient operation of the pathology laboratory; the hospital; the administrator and his staff; the professional services rendered by members of the medical staff and the duties and functions of the receiver, FRED FOSTER, PROVIDED HOWEVER, this restraining order is not intended to prevent the said Theodor E. Bratrud from entering the pathology laboratory during the normal hours it is open to perform pathology services and from using his personal equipment or equipment in which he has a financial interest so long as such use is consistent with this order, and

IT IS FURTHER ORDERED that this temporary restraining order shall expire and be of no further force and effect ten (10) days from the date hereof unless otherwise ordered by this court and that the said Theodor E. Bratrud appear on the 28th day of February, 1964 at 10 o'clock A. M. of the said day, in the United States District Court for the District of Arizona at Phoenix, Arizona, or as soon thereafter as counsel may be heard and show cause, if any he has, why:

1. A preliminary injunction should not issue restraining and enjoining Theodor E. Bratrud from entering upon or occupying the pathology laboratory of MARYVALE COMMUNITY HOSPITAL, INC. premises or any part thereof; from doing or performing any activities, functions or actions in and about the MARYVALE COMMUNITY HOSPITAL, INC., or its pathology laboratory or from otherwise interfering with the effective and efficient operation of the pathology lab-

oratory; the Hospital; the administrator and his staff; the professional services rendered by members of the medical staff and the duties and functions of the receiver, FRED FOSTER.

IT IS FURTHER ORDERED that this petition and order shall be forthwith filed in the Office of the Clerk of the United States District Court and entered of record and shall not be of any force or effect until the petitioner shall have posted a surety bond or cash in the amount of Five Hundred Dollars ($500.00) and IT IS ORDERED that a copy of the petition and this order to show cause be served upon Theodor E. Bratrud at least three (3) days before the date of the order to show cause. This order is entered and issued at 10 o'clock A. M. this 18th day of February 1964.

/s/ ROGER D. FOLEY
Roger D. Foley, Jr.
United States District Judge

Appendix II

(R 68-80)

In the District Court of the United States for the District of Arizona

In the Matter of
Maryvale Community Hospital, Inc.,
Debtor.

No. B-9352-Phx.

RESPONSE TO ORDER TO SHOW CAUSE AND APPLICATION FOR LEAVE TO SUE RECEIVER

Comes now Theodore E. Bratrud responding to the petition for restraining order on file herein and in conjunction therewith Fred Foster, Receiver herein admits, denies and alleges:

I.

Admits the allegations contained in Paragraph 1 reference to the appointment of Fred Foster as Receiver herein on November 26, 1963; that said Receiver assumed and acted as such Receiver thereafter and that the said Fred Foster was prior to his appointment a Co-Receiver in a proceeding in the Superior Court of the State of Arizona, in and for the County of Maricopa, being Cause No. 151970, receiving his appointment therein on or about July 31, 1963; and further admits that a controversy arose between the Co-Receivers in said state court proceeding and Respondent herein concerning the operation of the pathology laboratory known as Maryvale Medical Center Laboratory, 4550 North 51st Avenue, Phoenix, Arizona; Respondent further admits that said controversy concerned the termination of Respond-

ent's contract with Maryvale Community Hospital, Inc. for pathology services; that an accounting was sought therein, but denies each and every, all and singular, the other and remaining allegations therein contained.

II.

Answering Paragraph 2, Respondent denies that certain equipment has been removed from the pathology laboratory hereinabove described; admits that certain financial obligations regarding the purchase of certain equipment for use in said laboratory are in default; denies that Respondent has failed to take any steps to remedy such default; admits that a levy or distraint was issued and served by the Internal Revenue Service upon Fred Foster, Receiver herein because of the failure to transmit certain withholding taxes due upon wages of employees of said laboratory to the United States Internal Revenue Service; that all such defaults and the service of such distraint by the Internal Revenue Service was directly and proximately caused by the wilful and malicious breach of Respondent's contract with Maryvale Community Hospital, Inc. as hereinafter related, and the failure and neglect and refusal of said Receiver herein to account to or pay over to Respondent monies earned by him in the operation and conduct of said laboratory and services rendered to, for and on behalf of the patients within said hospital; that further Respondent alleges that no charges of any kind or nature whatsoever were ever lodged against Respondent with the medical staff of Maryvale Community Hospital reference to Respondent's conduct or operation of said laboratory, or the pathological services rendered therein; that the rules and regulations of said medical staff and the by-laws of Maryvale Community Hospital, Inc. have not been followed or observed; that

said Respondent has not been given or had an opportunity to be present at any hearing, meeting, or meetings, special or otherwise, at which his proficiency as such pathologist has been discussed or reviewed; that said purported meetings were invalid and of no force and effect insofar as the status of Respondent was concerned upon the staff of said hospital, or as a practicing medical doctor; that as a matter of fact, Respondent does have the confidence of the responsible membership of physicians and surgeons upon the staff of said hospital; Respondent further alleges that this Court is without jurisdiction or power to determine or adjudicate the issue with respect to the relationship of Respondent with the medical staff of said hospital; Respondent denies each and every, all and singular, the other remaining allegations therein contained.

III.

Respondent admits that said Receiver has directed the Hospital Administrator to change all locks or other means of securing the laboratory premises; and has further instructed the Hospital Administrator to temporarily impound and hold funds for out-patient service performed by the pathology laboratory and paid to the hospital, but in this regard Respondent denies that such instructions and orders were made and given in the interest of preserving and protecting the operation of the hospital or the pathology laboratory, or the property located in said hospital and laboratory, or in order to insure the orderly functioning of said hospital and pathology laboratory.

IV.

Further responding to said Receiver's petition herein and by way of application of leave to sue said Receiver, Respondent alleges:

1. That Respondent at all times herein was, and is duly licensed to practice as a medical doctor under and pursuant to the laws of the State of Arizona, and as such being especially skilled and qualified so to do, undertook to set up and establish the Maryvale Medical Center Laboratory for the express purpose of servicing the patients of Maryvale Community Hospital, Inc. and other patients in the community who were not patients of said hospital; that said Maryvale Medical Center Laboratory was originated, laid out and constructed under the instructions and supervision of said Respondent, and upon completion Respondent undertook to operate and service the requirements of said hospital and the patients of the physicians and surgeons practicing in Maryvale Medical Center within a building and upon property not owned or operated by said hospital; that said services were rendered under and pursuant to a formal written contract executed by and between the authorized officers of said hospital and Respondent, and wherein said hospital agreed to furnish all equipment, supplies, labor and incidental expenses necessarily incurred in the operation of said hospital and Respondent was entitled to receive a certain percentage of the gross revenues derived from said laboratory for services rendered as such pathologist; that on or about October 25, 1962, as a result of various discussions and conferences with the members of the Board of Directors of said hospital and the then acting Hospital Administrator, it was agreed to rewrite said contract to provide among other things that Respondent would furnish and equip said laboratory and to assume and discharge any and all obligations due upon such equipment purchased prior thereto by said hospital, and to pay all labor, wages and expense for supplies and incidentals necessary for the proper operation of said laboratory and for which said

hospital was to receive 20% of the net proceeds derived from the operation of said laboratory plus an additional 7% as reserve for bad debts in lieu of rent for the premises occupied by said laboratory; that said agreement was reduced to writing and was executed on October 25, 1962, and among other things the said Maryvale Community Hospital, Inc. agreed:

> "2. To act as the billing, accounting and collecting agent for the pathologist for all in-patient and emergency room pathology services and to maintain such books and records as are necessary to provide this service, said books and records to be made available for inspection and copying by the pathologist or his staff at such time and place as shall be mutually convenient to hospital and pathologist, or his staff."

and further:

> "4. The hospital will remit on the 1st and 15th of each month for the semi-monthly period just prior to each date to the pathologist 80% of all in-patient and the emergency room hospital billings for laboratory services, the pathologist or his staff to run and maintain the department of pathology as he sees fit, subject to the provisions of this Agreement. The pathologist will be reimbursed based upon his records of in-patient service. Such records may be examined by the hospital periodically."

That Respondent operated said laboratory under and pursuant to said written contract as aforesaid for the period from October 25, 1962, to and including July 31, 1963, being the date the said Fred Foster was appointed as Co-Receiver in Cause No. 151970 then commenced in the Superior Court of the State of Arizona, in and for the County of Maricopa.

2. That in addition to the contract of October 25, 1962, wherein Respondent was engaged as pathologist as afore-

said, Respondent did on the 31st day of October, 1962, undertake to assume and discharge that certain conditional sales contract by and between Maryvale Community Hospital, Inc. and Universal Surgical Supply, Inc. dba Western Surgical of Los Angeles, California, in the amount of $43,823.20 payable as therein set forth and further to purchase other equipment from said hospital upon the terms and conditions therein set forth, said payments to commence on December 31, 1963, and thereafter in annual installments until the sum of $5,000.00 had been paid and wherein said Maryvale Community Hospital agreed to:

> "2. To convey all title, right and interest hospital may have in said equipment to Bratrud."
>
> "3. To allow Bratrud or his staff to have complete custody and control of the above described equipment during and until such time as this agreement is in effect and until such time as final title passes to Bratrud or his staff."

That acting under and pursuant to each and all of the agreements hereinabove set forth, Respondent undertook to act as pathologist and to perform laboratory and pathological services to and for the use of said hospital and the patients therein and for certain patients who were not treated in said hospital; that Respondent undertook to and did employ a qualified and efficient staff numbering at times upwards of 20 employees, depending upon the work load and further did undertake to and did secure the necessary supplies, materials, appliances and other equipment for the efficient and convenient operation of said laboratory, and from and since October 25, 1962, operated and conducted said laboratory under and pursuant to said written contract; that in so doing Respondent caused to be furnished to the Hospital Administrator and to said Receiver complete, accurate and detailed statements of all services

rendered to or for and on behalf of the patients in said hospital and the amount due the laboratory for such services; and that said hospital and said Receiver was, and is required to collect said sums from the patients treated within said hospital to deduct the percentages due to said hospital as aforesaid, and to remit the balance on the first and fifteenth of each and every month said contract remains in existence; that all funds so received by said Receiver and said hospital are the personal property of Respondent, and was and is held in trust by said Receiver for the use and benefit of and payment to Respondent.

3. That shortly after the appointment of the said Fred Foster and Co-Receiver in Cause No. 151970 in the Superior Court of the State of Arizona, the said Foster instructed Preston Powell among other things as follows:

> "Payment of monies under the respective hospital contracts with Doctors Kennedy (radiologist) and Bratrud (pathology). Bratrud (pathology) should as of the above date be discontinued until new contracts are satisfactorily negotiated."

That said instruction among others was not based upon any other fact or circumstance than the said Foster's inclination and decision that the terms of said contract hereinabove referred to was inequitable to the said hospital; that said decision was arbitrary, capricious, unfounded and unauthorized in the premises in that said Fred Foster as such Receiver had no power under the state court proceedings to breach said contract or to terminate the same or to in any way interfere with the contractual relations between said hospital and said Respondent, but that notwithstanding the said Fred Foster as such Co-Receiver and said Preston Powell acting under and pursuant to the instructions hereinabove referred to, failed, neglected and refused to pay over

all funds earned by said laboratory and billed by said hospital to its patients and collected by said hospital from its patients as set forth in said contract, but to the contrary and in breach of the aforesaid contract, the said Fred Foster arbitrarily, capriciously, illegally and maliciously withheld and retained the funds belonging to said Respondent over and above the percentages due said hospital as in said contract provided; that the said Fred Foster failed, neglected and refused to pay said funds over to Respondent at the times and in the manner specified in said contract and at the time of termination of the state court proceeding, to-wit, the 26th day of October, 1963, there was due and owing and unpaid to Respondent the sum of $12,005.28 as and for services rendered and supplied to patients of Maryvale Community Hospital under and pursuant to the terms of said contract, all of which said sum the said Fred Foster has failed, neglected and refused to account for to said laboratory and to the Superior Court of Maricopa County, although requested so to do by said Court.

4. That Respondent since the appointment of said Fred Foster as Receiver herein has operated and conducted said Maryvale Medical Center Laboratory under and pursuant to the terms of the contract hereinabove referred to and has furnished pathological services to said hospital and to said Receiver daily, and for such services has rendered daily statements to the said Fred Foster and said Hospital Administrator for purposes of billing to and collecting the same from the hospital patients; that said Receiver in further breach of said contract and although the amounts due from patients for pathological services were collected and received by said hospital and said Receiver, failed, neglected and refused to pay to said Respondent any amount or sum other than the arbitrary sum of $3,000.00

on or about the first and fifteenth days of each month, commencing with the month of December, 1963; that there is due, owing and unpaid to Respondent from November 26, 1963, to and including the 15th day of February, 1964, $32,802.81 all of which Respondent alleges the said Fred Foster received in trust for the exclusive use and benefit of said Respondent, and which said amount said Respondent is reliably informed and believes has been converted or misappropriated by the said Fred Foster; or commingled with other funds of said hospital, and is now not available for payment to Respondent.

5. That the said Fred Foster has interfered with Respondent's contractual relationship with the members of Maryvale Medical Center Laboratory staff; that he has attempted to interfere with and destroy the relation between the Respondent and his associate, Dr. Judson A. Davison; that although supplying the sum of $3,000.00 on a semi-monthly basis, the same was advanced with the express instruction that said funds not be placed to the credit of the laboratory account and that said amount not be made available for the payment of laboratory bills, and that in no event should Respondent be allowed to draw checks upon said funds; that in addition the said Fred Foster has paid or allowed to be paid to Respondent's associate, Dr. Davison, the sum of $1,500.00 per month, said sum being the salary fixed by said Respondent for services rendered by the said Dr. Davison to said laboratory, and which said amount was properly payable by said Respondent to Dr. Davison; that this practice has continued from December 1963, until date hereof; that the amounts from time to time paid over by said Fred Foster, to-wit, the sum of $3,000.00 semi-monthly was insufficient to meet the payroll of the laboratory employees on Respondent's staff, and who were employed in furnishing the laboratory services to said hospital as

aforesaid; that the amounts so paid by said Receiver were barely sufficient to pay the net wages to said employees after calculating the deductions for social security, Federal and Arizona state withholding taxes, and that by reason thereof the taxes due upon said employees' wages were caused to accumulate and remain unpaid by reason of which the Internal Revenue Service in the performance of its duties issued a distraint upon the said Fred Foster and the said Preston Powell being the persons instrumental for the unlawful retention of Respondent's funds and directly and proximately responsible for the non-payment of the aforesaid taxes; that further the sum so advanced by said Receiver as aforesaid was wholly inadequate to meet or to pay the amounts due under the conditional sales contract assumed and agreed to be paid by Respondent under and pursuant to the terms of the Agreement of October 31, 1962, hereinabove referred to, and said contract has perforce gone to default and the conditional seller has threatened Respondent with the repossession of said laboratory equipment; that as a further consequence of the breach of said contract by said Receiver, Respondent has been unable to pay the various suppliers, chemical reagents, supplies and materials necessarily used in the performance of pathological services by reason of which Respondent has been threatened with law suits and has been harassed by creditors, and his credit damaged and destroyed.

6. That under date of February 11, 1964, said Receiver instructed the said Preston Powell to publish to Respondent's suppliers that said Maryvale Medical Center Laboratory was being operated by the Maryvale Community Hospital, Inc. and not by said Respondent, effective as of February 4, 1964; that in pursuance of the Receiver's design and plan to confiscate and appropriate the property and practice of Respondent, said Receiver did instruct that

the locks be changed upon said laboratory and further placed all of said laboratory employees on the payroll of said hospital; that in certain instances the wages of valued and skillful employees was reduced, impairing their morale and efficiency; that said Receiver purports to operate said laboratory in conjunction with said hospital and as an adjunct thereof; that in so doing said Receiver has attempted to appropriate the property of Respondent; that he has instructed the United States Post Office to deliver all mail addressed to the Maryvale Medical Center Laboratory to be delivered to said Receiver, and that said Receiver has opened Respondent's mail and has extracted checks earned by said Respondent therefrom and holds said money and checks without Respondent's consent; that said funds were not earned by said hospital or said Receiver, and represents receipts from Respondent's private patients entirely disassociated with the Maryvale Community Hospital, Inc., that said Receiver purports to operate and conduct said laboratory and has billed and is billing the patients of said hospital for services rendered by said laboratory, all of which constitutes the practice of medicine and is illegal, unethical and contrary to the form, force and effect of the statutes of the State of Arizona relating to the practice of medicine and subjects said hospital and said Receiver to prosecution for a felony under and pursuant to Section 32-1456(b) A.R.S.

That the said Fred Foster has done all of such things and in such manner with the intent and purpose of harassing your Petitioner and to exercise duress and economic compulsion upon him in order that he submit to a renegotiation of the terms of the contract with Maryvale Community Hospital, Inc. hereinabove referred to, which said Receiver has heretofore proposed; that said Receiver has so acted

with the intent to destroy Petitioner's practice as pathologist and to cause him to lose his property, earnings and income from the continued operation of said laboratory and as such pathologist; that he has unlawfully converted and appropriated the property of said Respondent; that he has failed to conduct himself in an impartial manner with fairness or with honesty or with common decency, but has discriminated between different employees of said laboratory and further has discriminated between the various members of the staff of the Maryvale Community Hospital, Inc.; that he has failed to fulfill the trust imposed upon him as such Receiver, but has conducted said receivership for his personal aggrandizement; that said Receiver was prior to his appointment herein biased and prejudiced against said Respondent, had exhibited a vindictive attitude and demeanor toward said Respondent and further at all times since his appointment has endeavored to place the Maryvale Community Hospital, Inc. in bankruptcy, and in fact recommended that the same be done, and is in all respects unfit and unqualified to act as such Receiver by reason of his relationship with said hospital and Respondent prior to his appointment as Receiver herein, and further because of his association and affiliation with the Maricopa County Hospital Development Association, which said organization is hostile to the interests of all suburban community hospitals, of which Maryvale Community Hospital, Inc. is one; that all attempts on the part of Respondent to conciliate or adjust the differences existing between said Receiver and said Respondent have been unavailing and unproductive; that demands in the past have been made upon said Receiver to pay the sums due under and pursuant to said contract; to comply with the terms and conditions of said contract hereinabove referred to and to cease and desist

from his efforts to interfere with the management, operation and conduct of said laboratory and the employees and property thereof, and that any further demand would have been and is nugatory and fruitless; that Respondent has no recourse except in a court of law for redress against said Receiver; that the injury and damage done to said Respondent by said Receiver, both in the state court proceeding have been, and are irreparable; that Respondent's investment in said laboratory is in the approximate amount of $63,500.00 after deducting depreciation for tax purposes.

That Respondent has fully and fairly stated the case as hereinabove related to Herbert Mallamo, his attorney, 216 Luhrs Building, Phoenix, Arizona, and upon said statement and facts he is advised by such counsel, and verily believes that he has a good and substantial cause of action against said Receiver to recover the funds illegally withheld as hereinabove set forth amounting to $44,808.09 less any credits which would be allowed for expenditures made by said Receiver for and on behalf of said laboratory without the knowledge of said Respondent; and to recover possession of the premises and property purportedly seized, confiscated and appropriated by said Receiver, and to enjoin said Receiver from interfering with the conduct and operation of said laboratory by said Respondent, and for such other and further relief as to the Court may seem just and proper in the premises.

WHEREFORE, Respondent prays the Court as follows:

1. That the Order to Show Cause issued against Respondent be forthwith quashed.

2. That the temporary injunction issued out of this Court against the Respondent be vacated.

3. That said Receiver as an officer of this Court be compelled forthwith to pay over to Respondent the sum of

$44,808.09 less any credits properly allowable for expenditures made on behalf of Respondent without his knowledge during the period of said receivership.

4. Or in the alternative, Respondent be granted leave to sue FRED FOSTER, Receiver herein, for his breach of said contract hereinabove described and for his acts, conduct, derelictions and omissions to faithfully perform the trust imposed upon him by this Court.

5. For an Order compelling said Receiver to restore the exclusive management, control and operation of MARYVALE MEDICAL CENTER LABORATORY to Respondent, together with the furniture, furnishings, fixtures, equipment, supplies and materials therein contained.

6. That said Receiver be enjoined and restrained from interfering with, or in any manner obstructing Respondent's practice as pathologist, or the conduct of said laboratory and the property and employees thereof.

7. For such other and further relief as to the Court may seem just and proper in the premises.

/s/ HERBERT MALLAMO
Herbert Mallamo
Attorney for Respondent

STATE OF ARIZONA
County of Maricopa—ss.

THEODORE E. BRATRUD, being first duly sworn, upon his oath deposes and says: That he is the Respondent in the foregoing action; that he has read the foregoing Response to Order to Show Cause and Application for Leave to Sue Receiver and knows the contents thereof; that the matters and things set forth are true except those matters and things alleged upon information and belief, and as to those he believes them to be true.

/s/ THEODORE E. BRATRUD
Theodore E. Bratrud

Subscribed and sworn to before me this 6th day of March, 1964.

/s/ MARY B. DOOLEY
Notary Public

My Commission expires:
December 5, 1964.

Copy of the foregoing mailed this
..... day of March, 1964, to:

SHIMMEL, HILL, KLEINDIENST
& BISHOP
Suite 1212, 222 North Central
Avenue
Phoenix, Arizona 85004
Attorneys for Receiver

HERBERT MALLAMO
Attorney for Respondent

Appendix III

Q. When did these problems exist?

A. They have existed prior to the time that the hospital started paying the payroll.

Q. They do not exist now?

A. No.

Q. And they have not existed since the hospital took over?

A. I believe it was February 1st. I believe that was the time. We have had no problem since then.

Q. Were you with Dr. Bratrud one time when he took the hospital Jeep and went up in the mountains?

A. No, sir.

Q. Are you familiar with that incident?

A. I have heard about it, but I don't know the details.

Q. There was some tissue taken out of the laboratory and lost on that trip?

A. That I didn't know anything about.

Q. You didn't hear anything about that?

A. No.

Q. Do you know why Dr. Bratrud left the hospital he was at with you in Michigan and came to Phoenix?

A. No, I do not know.

MR. MEYERS: I have no other questions.

MR. MALLAMO: No questions.

THE COURT: You are excused.

(Witness excused.)

THE COURT: Do you have any further witnesses other than for cross-examination?

MR. MALLAMO: I think that concludes it, your Honor.

THE COURT: How long do you think it would take you to complete your cross-examination of Mr. Foster?

MR. MALLAMO: Well, your Honor, I would like to review the transcript, if I may. I don't think it would be very long, your Honor.

THE COURT: Would an hour be sufficient?

MR. MALLAMO: Possibly. I think I am ready to close, your Honor, without re-examining this thing.

THE COURT: At this time?

MR. MALLAMO: Yes, your Honor. With the observation, if the Court insists that we file an additional petition for leave to sue. This is my main inquiry.

THE COURT: I think I would treat that independently of this application.

MR. MALLAMO: Yes.

THE COURT: You certainly may do that. I don't know what the law provides on that, what I would do if I had authority to authorize a suit against the receiver, but you certainly may file any petitions you are inclined to file. If you are ready to close—I start another trial Monday, I am leaving for home this afternoon, I can't give you any time tomorrow. I really don't think I need argument, actually.

MR. MALLAMO: I think we are ready to close without re-examining Mr. Foster, your Honor.

THE COURT: Are you ready to close, Mr. Meyers?

MR. MEYERS: Yes, sir.

THE COURT: All right, then, the matter will stand submitted. I will have a ruling out shortly.

Do you gentlemen wish to have a transcript of today's proceedings?

MR. MALLAMO: I don't care for one, your Honor.

MR. MEYERS: I don't think it will be necessary, your Honor.

THE COURT: Thank you.

(The Court adjourned at 5:02 o'clock p.m., March 26, 1964.)

In the Matter of
Maryvale Community Hospital, Inc.,
Debtor.

Case No. B-9352-Phx.

CERTIFICATE

I HEREBY CERTIFY that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified herein, and that said transcript is a true and correct transcription of my stenographic notes.

DATED at Phoenix, Arizona, this 13th day of April, 1964.

/s/ HELEN R. SOLOMON
Official Reporter
United States District Court
For the District of Arizona

Appendix IV(a)

EXHIBIT "A"

AGREEMENT

THIS AGREEMENT made and entered into this 25 day of October, 1962 by and between MARYVALE COMMUNITY HOSPITAL, INC., an Arizona non-profit corporation, hereinafter designated as Hospital and THEODOR E. BRATRUD, hereinafter designated as Pathologist.

WITNESSETH:

WHEREAS, the hospital is desirous of establishing and maintaining a department of pathology and in connection therewith to maintain standards in the practice of pathology which will meet with the requirements of approval by the Joint Commission of Accreditation of Hospitals, the American Society of Clinical Pathologists and the College of American Pathology and

WHEREAS, the pathologist will be a physician duly licensed to practice medicine in the State of Arizona and a recognized specialist in pathology eligible for certification by the American Board of Pathology in pathologic anatomy and/or clinical pathology.

WHEREAS, both parties recognize that the practice of medicine is legally a franchise granted by the State to an individual after rigid technical training and due examination, and it is the desire of both parties that the professional services of the pathologist be made available to the patients in the hospital and to the professional staff of the hospital.

I. THE HOSPITAL COVENANTS AND AGREES AS FOLLOWS:

1. To make adequate provisions for proper and adequate space for the pathology department including but

not limited to operating space for technologists and personnel, storage space for supplies and pathological specimens, laboratory space, and quarters for the housing and maintenance of animals as may be required for clinical diagnostic and experimental procedures and to equip such space with the necessary basic equipment and facilities to maintain such department.

2. To act as the billing, accounting and collecting agent for the pathologist for all in-patient and emergency room hospital pathology services and to maintain such books and records as are necessary to provide this service, said books and records to be made available for inspection and copying by the pathologist or his staff at such time and place as shall be mutually convenient to hospital and pathologist or his staff.

3. To provide lighting, heating, janitor service, telephone service and all basic utilities to the space provided for the pathology services.

4. The hospital will remit on the 1st and 15th of each month for the semi-monthly period just prior to each date to the pathologist 80% of all in-patient and emergency room hospital billings for laboratory services, the pathologist or his staff to run and maintain the department of pathology and laboratory as he sees fit, subject to the provisions of this agreement. The pathologist will be reimbursed based upon his records of in-patient services. Such records may be examined by the hospital periodically.

II. PATHOLOGIST COVENANTS AND AGREES AS FOLLOWS:

1. To assume the responsibility for the conduct of the department of pathology and to devote such time as is necessary to provide proper and adequate service and

supervision which will meet the needs of the patients and/or the medical staff.

2. To be responsible for matters of general policy, rules, regulations, professional and technical procedures, and the development of clinical or other research projects within the department of pathology.

3. To be responsible for the prompt performance of all laboratory examinations requested, the preparation of written reports and the retention of such materials as microscopic sections; to keep accurate and complete records, including a proper filing system.

4. To be responsible for the performance of duly authorized autopsies on hospital patients properly admitted, whose deaths are legally regarded as hospital deaths, and to make available promptly for the hospital record, the attending physician and the departmental files, reports including both gross and microscopic findings, and to preserve pertinent tissues, blocks and sections in conformity with established customs and laws at no charge to the hospital.

5. To engage such physicians and technicians and other personnel as are required for the proper functioning of the department and to be responsible for the purchase of all supplies and equipment necessary for the conduct and improvement of the pathology service.

6. To provide, without charge, such pathology services as may be required for the care of bona fide charity patients of the hospital and also that which is necessary to protect patients and personnel from communicable diseases within the hospital.

7. To provide for consultations at operations and for frozen section diagnosis and for consultation with staff physicians.

III. THE PARTIES MUTUALLY COVENANT AND AGREE AS FOLLOWS:

1. For and in consideration of the services to be rendered and the covenants to be performed by the hospital, pursuant to Section I of this agreement, the pathologist or his staff agree to reimburse the hospital 20% of the gross billings for the laboratory as and for payment of rent, lights, heat, in-patient bookkeeping and accounting, telephone service and janitor service, and basic utilities. The books and records of the hospital insofar as they relate to the income or fees produced by or earned from the laboratory or the pathologist and his staff shall be subject to the inspection and audit of the pathologist and his staff as above mentioned in Paragraph I Section 2. In the event there is any dispute between the parties hereto concerning the amount of income due and payable to either party hereunder, findings and report of a certified public accountant mutually acceptable to both parties shall be conclusive in such determination.

2. The pathologist or his staff may provide services to patients, citizens and institutions outside the hospital and any remuneration therefore shall belong entirely to the pathologist and his staff, provided, however, that such other professional activities must not interfere with services to the hospital staff and patients as designated herein.

3. The pathologist shall be known and designated as Chief of the Pathology Department and shall have status equivalent to that of any other Chief of Services within the hospital and shall be a member of the medical executive committee the same as other department heads with the pathology services to be a division of the hospital staff equal in all respects to other divisions of the hospital.

4. The pathologist shall be an independent contractor and maintain and operate the department of pathology and

the laboratory exclusively under his supervision with the right to make such rules and regulations, to hire and fire personnel necessary for the operation of the laboratory and to decide all matters of policy pertaining to the department of pathology insofar as these provisions do not directly conflict with any hospital laws, by-laws, provisions, or policies.

5. The pathologist or his staff shall provide for continuing professional service.

6. This agreement shall be applicable and continued in force with any associates or assigns of the pathologist and shall be binding upon the successors and assigns of the hospital.

7. This agreement shall be for a term of five (5) years from this date and shall be deemed to be automatically renewed unless terminated in writing by either party at least 180 days prior to the renewal date.

8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist.

9. Any of the matters contained in this agreement may be altered from time to time by the written consent of the parties to this agreement without in any way effecting the remainder of this agreement.

10. This agreement shall supercede and replace any and all previous agreements entered into by and between THEODOR E. BRATRUD and the hospital.

IN WITNESS WHEREOF the parties have caused this agreement to be executed at Phoenix on the ..... day of October, 1962.

MARYSVALE COMMUNITY HOSPITAL

By /s/
President

ATTEST:

/s/
Secretary

By /s/ T. E. BRATRUD, M.D.
T. E. Bratrud

EXHIBIT "B"

1 Labline Oven
1 P/D Centrifuge
1 Heavy Duty Muffle Furnace
1 Refrigerated Centrifuge
1 Chromalox Hot Plate
1 Labline Heated Magnetic Stirrer
1 Sartobius Balance
1 Electric Desalter
1 Beckman Gas Chromatograph
1 Stone Automatic Titrator
1 Turner Flurometer
1 Beckman Spectrophotometer
1 Chromalox Hot Plate
2 Labline Water Bath
1 Labline Heated Magnetic Stirrer
1 Reichert Binoc
1 Prado Projector
1 Anaptrol & Accessories
1 Beckman Expanded Scale Ph. Mixer
1 Beckman Constant Temp. Block
1 Set Varicord Recorder
Photovolt Densitormeter
Photovolt Power Supply
1 Ratro Recording Spectrophotometer
1 Beckman Microchemical Set
1 Waring Blender
1 Tissue Processor
1 Chromatocab
1 Eberback Decalcifier
1 Lipshaw Honer Stroper
1 Lipshaw Parafin Dispenser
1 Large Waring Blender
1 Refractometer

1 Delineoscope
1 Labline Oven
1 ???? Oven (Incubator)
1 Vacuum Oven
1 Vacuum Pump
1 Coleman Jr. Spectrophotometer
2 Labline Water Bath
1 ?/P Centrifuge
1 Labline Oven
1 Cryostat & Microtome
1 Camera for A/O Microscope
1 Jewett Blood Bank Refrigerator
1 Blood Bank Recording Thermometer
1 Blood Bank Alarm
1 ?????
1 Water Bath
4 Gilbert Timers
1 Westinghouse Refrigerator
1 Pepette Washer
1 Lipshaw Tissue Dryer
1 Lipshaw Parafin Oven
1 Clay Adams Microhematocrit Reader
1 Clay Adams R.H. Meat Box
1 Microtome 70A with 284 Freezing Head
1 Microtome 40A
1 Tissue Processer—Lipshaw Model 1100
1 Spectrophotometer Coleman Model 6-C
1 Rotator Yankee
2 Pipette Rotators (3 Units in Each)
1 Labline Oven
1 Labline Water Bath
1 Water Bath—Lipshaw Tissue Float
2 Microscopes
1 Microscope

1 Incubator Labline
1 Flame Photometer
1 Air Pump
1 Clay Adams Laboratory Counter
1 Phillips Drucker Model 708 Centrifuge
1 Phillips Drucker Model 707 Centrifuge (With Acc.)
1 Natelson Microgasometer
1 Magnistir
1 Westinghouse Refrigerator
2 Smith Victor Flood Lamps
1 Westinghouse Refrigerator
1 Collins Respirometer
1 Heith Kit Power Supply
1 Electrophoresis Cell, Constant Flow
1 Lipshaw Electric Parafin Knife
4 Westinghouse Refrigerators
1 Lucas Seburg Sound System
1 Westinghouse Freezer
2 Uher Tape Recorders
1 Westinghouse Freezer
1 Monromatic
Oven Typewriter & Microtome
Glassware and Expendables

Appendix IV(b)

AGREEMENT AND ASSIGNMENT

THIS AGREEMENT AND ASSIGNMENT, made and entered into this ..... day of ....., 1964, by and between DR. THEODOR E. BRATRUD, hereinafter referred to as "BRATRUD", and DR. JUDSON A. DAVIDSON, hereinafter referred to as "DAVIDSON";

WHEREAS, BRATRUD is and has been for some years past a duly recognized specialist in the field of pathology and a duly licensed physician in the State of Arizona; and

WHEREAS, on the 25th day of October, 1962, BRADRUD entered into an Agreement with the Maryvale Community Hospital, Inc., wherein BRATRUD agreed to perform pathological services for the hospital through the Maryvale Medical Center Laboratory and assumed the duties as pathologist of the Maryvale Medical Center Laboratory pursuant to said Agreement, and has ever since thereafter been so engaged in the practice of pathology on behalf of the Maryvale Community Hospital, Inc. and on his own behalf; and

WHEREAS, while in the practice of pathology, BRATRUD has acquired certain pathological equipment and expendables, which are presently located at the Maryvale Medical Center Laboratory and equip said laboratory; and

WHEREAS, for diverse reasons, BRATRUD is desirous of assigning his interest in the pathological contract he holds with Maryvale Community Hospital, Inc. to DAVISON, along with the pathological equipment and expendables which equip the Maryvale Medical Center Laboratory, all for valuable consideration; and

WHEREAS, DAVISON is desirous of acquiring BRATRUD'S interest in said pathological contract, and in purchasing same, along with the aforesaid equipment and expendables

owned by BRATRUD, subject to express stipulations and restrictions hereinafter contained; and

WHEREAS, DAVISON is a duly recognized specialist in the field of pathology and a duly licensed physician in the State of Arizona, and is competent to serve as pathologist for the Maryvale Community Hospital, Inc. and is acceptable to the administration and medical staff of said Maryvale Community Hospital, Inc.,

NOW, THEREFORE, in consideration of the promises hereinafter contained the parties do hereby agree as follows:

1. BRATRUD do hereby assign to DAVISON all of BRATRUD's right, title and interest in and to that certain pathological contract dated October 25, 1962, by and between BRATRUD as pathologist, and the Maryvale Community Hospital, Inc., a copy of which contract is attached to this Agreement as "Exhibit A" for purposes of identification.

2. BRATRUD does hereby sell to DAVISON all of his right, title and interest in and to the equipment and expendables of the Maryvale Medical Center Pathology Laboratory, located at 4514 North 51st Avenue, Phoenix, Arizona, it being expressly agreed that said equipment includes, but is not limited to, those items of personalty listed on "Exhibit B" of this Agreement attached hereto.

BRATRUD warrants this equipment to be free and clear of any encumbrances, save and except the lien created by the conditional sales contract now held by C.I.T. Investment Company, which said lien BRATRUD warrants does not exceed the sum of Thirty One Thousand Dollars ($31,000.00), and the lien held by Maryvale Community Hospital, Inc., which BRATRUD warrants not to exceed the sum of Five Thousand Dollars ($5,000.00).

3. In consideration of the foregoing covenants, DAVISON agrees to pay BRATRUD the following sums of money, subject to the conditions hereinafter set forth:

(a) Fifteen Thousand and 00/100 Dollars ($15,000-.00) upon the execution of this Agreement and upon the acceptance by the co-receivers and the Board of Directors of the Maryvale Community Hospital, Inc. of a formal written assignment of the pathological contract to DAVISON;

(b) Five Thousand and 00/100 Dollars ($5,000.00) one year from the date of the first payment;

(c) Five Thousand and 00/100 Dollars ($5,000.00) one year from the date of the second payment;

(d) Five Thousand and 00/100 Dollars ($5,000.00); one year from the date of the third payment.

It is expressly agreed that DAVISON shall not be liable for any debts incurred by BRATRUD, either in the operation of the Maryvale Medical Center Laboratory, or otherwise, except those encumbrances existing against the equipment previously noted. In the event that any additional encumbrances be found to exist against said equipment, or in the event DAVISON be required to pay any other lawful debts of BRATRUD, then payment by DAVISON of these obligations shall operate to reduce DAVISON's obligation to pay BRATRUD the above amounts, and shall be considered an offset against the payment thereof. Further, should DAVISON be required to pay in excess of the balance then due to BRATRUD under this contract, then and in that event, BRATRUD agrees to pay and hold DAVISON harmless from any loss due to the payment of the additional sums so expended by DAVISON.

4. Any provisions to the contrary notwithstanding, this entire Agreement is contingent upon the approval of the co-receivers of Maryvale Community Hospital, Inc. and of the present directors of the Maryvale Community Hospital, Inc., of a formal written assignment of the pathological contract from BRATRUD to DAVISON. The foregoing provision is a condition precedent to the operation of this Agreement.

IN WITNESS WHEREOF, we have hereunto affixed our hands this 28th day of April, 1964.

/s/ THEODOR E. BRATRUD
Theordor E. Bratrud

/s/ JUDSON A. DAVISON
Judson A. Davison

ADDENDUM

1. The sum of $15,000.00 provided to be paid under Paragraph 3.(b)(c)(d) hereof is to be evidenced by a promissory note payable in three annual installments of $5,000.00 each year, commencing May 1, 1965, without interest.

2. It is agreed Assignor reserves all income from and agrees to pay all payroll expenses of Maryvale Medical Center Laboratory to and including April 30, 1964. The Assignment between the parties is to become effective as of May 1, 1964.

Dated this 28th day of April, 1964.

/s/ THEODOR E. BRATRUD
Theodor E. Bratrud

JUDSON A. DAVISON
Judson A. Davison

State of Arizona
County of Maricopa—ss.

On this, the 28 day of April, 1964, before me, the undersigned officer, personally appeared THEODOR E. BRATRUD, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same for the purposes contained therein.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

/s/ MARY B. DOOLEY
Notary Public

My Commission Expires:
My Commission Expires Dec. 5, 1964

State of Arizona
County of Maricopa—ss.

On this, the 28 day of April, 1964, before me, the undersigned officer, personally appeared JUDSON A. DAVISON, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same for the purpose contained therein.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

/s/ MARY B. DOOLEY
Notary Public

My Commission Expires:
My Commission Expires Dec. 5, 1964

Appendix IV(c)

ASSIGNMENT

For value received, THEODOR E. BRATRUD, of Phoenix, Arizona, does hereby assign, transfer and set over to Dr. JUDSON A. DAVISON, all of his right, title and interest in and to that certain Agreement made and entered into the 25th day of October, 1962, by and between MARYVALE COMMUNITY HOSPITAL, INC., an Arizona non-profit corporation and the said Assignor, subject to all the terms and conditions thereof; together with all of his right, title and interest in and to that certain Assignment and Agreement made and entered into on the 31st day of October, 1962, by and between the said MARYVALE COMMUNITY HOSPITAL, INC. and Assignor herein, providing for the sale among other things, of certain equipment and supplies therein specified and set forth; together with all of his right, title and interest in and to that certain Conditional Sales Contract made and entered into on August 7, 1962, and between MARYVALE COMMUNITY HOSPITAL, INC. as buyer, and UNIVERSAL SURGICAL SUPPLY, INC. dba. WESTERN SURGICAL, of 653 South Burlington Avenue, Los Angeles; together with the equipment, appliances and supplies therein described and set forth.

DATED this 28 day of April, 1964.

/s/ THEODOR E. BRATRUD
Theodor E. Bratrud

STATE OF ARIZONA
County of Maricopa—ss.

On this the 28 day of April, 1964, before me, the undersigned officer, personally appeared THEODOR E. BRATRUD, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

/s/ MARY B. DOOLEY
Notary Public

My Commission expires:
My Commission Expires Dec. 5, 1964

ACCEPTANCE OF ASSIGNMENT

DR. JUDSON A. DAVISON, Assignee, hereby accepts the foregoing Assignment subject to all the terms and conditions thereof, and agrees to perform and discharge the same in accordance with the tenor thereof.

/s/ DR. JUDSON A. DAVISON
Dr. Judson A. Davison

STATE OF ARIZONA
County of Maricopa—ss.

On this the 28 day of April, 1964, before me, the undersigned officer, personally appeared DR. JUDSON A. DAVISON, known to me (or satisfactorily proven) to be the person whose name is subcribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

/s/ MARY B. DOOLEY
Notary Public

My Commission expires:
My Commission Expires Dec. 5, 1964

CONSENT TO ASSIGNMENT

The undersigned, do hereby approve and consent to the foregoing Assignment and Acceptance thereof executed by THEODOR E. BRATRUD, Assignor, and DR. JUDSON A. DAVISON, Assignee.

DATED this ..... day of April, 1964.

MARYVALE COMMUNITY HOSPITAL INC.
a non-profit corporation

By .....
President

.....
Hospital Administrator

.....
Fred C. Foster, Receiver, Maryvale Community Hospital, Inc., Debtor, in Chapter X Proceedings, B-9352-Phx.

Appendix IV(d)

MARYVALE MEDICAL CENTER LABORATORY, [Letterhead]
4550 NORTH 51st AVENUE
PHOENIX 31, ARIZONA
PHONE 939-6511 Ext. 257
939-4632

8628 N. 7'th. Ave.
Phoenix, 21, Arizona.
April 30, 1965

Mr. Frank Dunning
Trustee, Maryvale Hospital Inc.
51'st Ave. and W. Campbell
Phoenix, Arizona 19

Dear Mr. Dunning:

Since the ~~contract for~~ laboratory services was terminated by mutual agreement, my sale of the laboratory to my former associate was completed in October 1964 and the monies due me as ordered by the Referree in Bankruptcy were paid me last month it is now aprops to conclude my Medical Staff affiliation with the Hospital. Owing to my illness, therefore I wish to submit my resignation from the Active Medical Staff of Maryvale Community Hospital effective November first 1964, retroactively.

With every good wish for the continued successfull operation of the hospital in the future I remain,

Yours very truly,

/s/ T. E. BRATRUD M.D.
Theodor E. Bratrud M.D.

Appendix V

AGREEMENT AND MUTUAL RELEASE

THIS AGREEMENT, made this 4th day of November, 1964, by and between JUDSON A. DAVISON, hereinafter referred to as "DAVISON", and THEODOR E. BRATRUD, hereinafter referred to as "BRATRUD",

WITNESSETH:

That heretofore, and on the 28th day of April, 1964, the parties hereto entered into that certain "Agreement and Assignment" wherein and whereby, for the considerations therein expressed, DAVISON agreed to pay BRATRUD the sum of $30,000.00 as follows: $15,000.00 upon execution of said Agreement and $15,000.00 in three equal annual installments on each subsequent anniversary date until said balance be paid in full; and

WHEREAS, the parties hereto are desirous of settling all outstanding rights, claims, controveries and interests of whatsoever kind and nature existing between them, save and except as herein expressly provided;

NOW, THEREFORE, IT IS AGREED as follows:

1. That for and in consideration of the sum of $14,650.00 in hand paid by DAVISON to BRATRUD, the receipt of which is hereby acknowledged, the said BRATRUD does hereby satisfy, discharge and release DAVISON from the payment of any and all sums of monies, actions, suits, proceedings, claims, bills, notes, debts and demands of whatsoever kind and character which the said BRATRUD ever had, now has, or which may hereafter accrue in respect to that certain contract between the parties hereto made and entered into on April 28, 1964, respecting the sale and purchase of MARYVALE MEDICAL CENTER LABORATORY. In addition to the foregoing, BRATRUD does hereby for himself, his heirs, repre-

sentatives and assigns, release and absolve and forever discharge DAVISON from any and all claims, demands, actions and causes of action of every kind and nature which he ever had, now has or may hereafter have by reason of his association and dealings with DAVISON, including but not limited to the following specific terms:

(a) Any and all billings by suppliers for merchandise or equipment sold and delivered to MARYVALE MEDICAL CENTER LABORATORY for useage on or prior to April 30, 1964, and charged to the account of BRATRUD, including but not limited to the statement from SCIENTIFIC PRODUCTS as rendered for the month of October, 1964, and WESTERN SURGICAL SUPPLY for column valves and recorder for the gas chromatograph.

(b) Any claim of ownership or interest by BRATRUD to any equipment of whatsoever kind, nature or description now located within and upon the premises known and described as MARYVALE MEDICAL CENTER LABORATORY, 4550 North 51st Avenue, Phoenix, Arizona, or located within and upon the premises known and described as MARYVALE COMMUNITY HOSPITAL, INC.

(c) Any claim by BRATRUD against DAVISON relative to any and all accounts receivable of MARYVALE MEDICAL CENTER LABORATORY earned on or after May 1, 1964.

(d) Any claim by BRATRUD to any records, invoices, records or documents of every kind and nature whatsoever presently contained in or comprising the records of MARYVALE MEDICAL CENTER LABORATORY, provided however, that the bookkeeping, accounting records and any and all invoices, vouchers, memoranda or records of expense incurred in the operation of said laboratory for the period prior to May 1, 1964, whether charged directly or indirectly to BRATRUD shall be made avail-

able to GEORGE L. SHEPPARD, BRATRUD's accountant for purpose of the preparation and completion of the 1964 income tax return.

(e) Any and all monies received by DAVISON from MARYVALE COMMUNITY HOSPITAL, INC. for the operation of MARYVALE MEDICAL CENTER LABORATORY from September 1963 through April 1964.

(f) Any claim by BRATRUD against DAVISON relative to any and all monies expended or liability incurred by BRATRUD in connection with his dealings with MESA LUTHERAN HOSPITAL, negotiations with REX WEAVER and/or TREZILLERI regarding MESA LUTHERAN LABORATORY, H. JENSEN CONSTRUCTION CO., INC., H. JENSEN, or FIRST FEDERAL SAVINGS & LOAN ASSOCIATION.

(g) Any claim by BRATRUD to motor vehicle tires, equipment or accessories now in the possession of DAVISON.

(h) Any claim by BRATRUD against DAVISON for damages to any personal property owned by BRATRUD including, but not limited to, his boat and motor.

2. Under and pursuant to the Agreement of April 28, 1964, DAVISON assumed and agreed to pay the lien held by MARYVALE COMMUNITY HOSPITAL, INC. for and upon the original laboratory equipment purchased by said Hospital in 1961; in this connection, in the event said Hospital deducts and retains any amount of said lien from monies earned by the laboratory prior to May 1, 1964, then DAVISON expressly agrees to pay to BRATRUD that sum of money which DAVISON would otherwise be obligated, pursuant to the Agreement, to pay said Hospital. In such event, it is further agreed that 50% of this amount will be paid on or before the ..... day of December immediately following the date of settlement of BRATRUD's claim for reclamation

or petition for allowance presently pending before the Referee in Bankruptcy in the matter of MARYVALE COMMUNITY HOSPITAL proceeding in Chapter X, Cause No. B-9352-Phoenix, in the District Court of the United States for the District of Arizona, and 50% on or before one year after the date of the first payment as aforesaid.

3. DAVISON does hereby release, absolve and forever discharge BRATRUD from any and all claims, demands, actions and causes of action of every kind and nature which he ever had, now has, or may hereafter have arising out of his employment as Pathologist at and purchase of MARYVALE MEDICAL CENTER LABORATORY, including, but not limited to, any items of equipment, records, materials or supplies enumerated and described in the inventory attached to the Agreement of April 28, 1964, and specifically any and all microscope parts, equipment and personal items retained by BRATRUD and now in his possession.

4. It is further understood that BRATRUD retains and owns all of the accounts receivable earned or charged for out-patient pathological services to and including the 30th day of April, 1964, and that in the event patients of said laboratory should pay or cause to be paid any such charges incurred prior to the 30th day of April, 1964, to DAVISON, or to the MARYVALE MEDICAL CENTER LABORATORY, any and all such monies shall be accounted for to BRATRUD at the end of the month following their receipt. In this regard, DAVISON agrees to allow and permit the said GEORGE L. SHEPPARD, C.P.A., to inspect said out-patient receipts and to collect and receive the same from DAVISON for and on BRATRUD's behalf.

5. The parties hereto mutually agree and specifically allege, declare and aver, each to the other, that each of the parties hereto has been counseled and advised by an attorney of his choosing as to the execution of this Agreement

and all effects, implications or ramifications this Agree- has or will have, legal or otherwise, and further each party to this Agreement solemnly and specifically avers that the foregoing agreement has been entered into without undue influence, fraud, coercion or misrepresentation or for any cause or reason except as herein specified.

6. This is the entire agreement between the parties, and all prior negotiations, statements, declarations and agreements of every kind and nature, whether oral or written, expressed or implied, save and except that certain agreement made and dated April 28, 1964, by and between the parties hereto, are either discarded or merged in this Agreement; no amendment, alteration or modification of this Agreement shall be valid or binding upon any party unless and until reduced to writing and signed by the parties hereto.

7. This Agreement shall be binding upon and inure to the parties hereto, their heirs, personal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties hereto affix their signatures the day and year first above written.

/s/ JUDSON A. DAVISON
Judson A. Davison

/s/ THEODOR E. BRATRUD
Theodor E. Bratrud

State of Arizona
County of Maricopa—ss.

On this, the 11th day of November, 1964, before me, the undersigned officer, personally appeared JUDSON A. DAVISON, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the consideration and purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

/s/ ADELAIDE V. GESL
Notary Public

My Commission Expires:
Dec. 1, 1964

State of Arizona
County of Maricopa—ss.

On this, the 4th day of November, 1964, before me, the undersigned officer, personally appeared THEODOR E. BRATRUD, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the consideration and purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

/s/ MARY B. DOOLEY
Notary Public

My Commission Expires:
Dec. 5, 1964

Appendix VI

(R 115-117)

In the United States District Court
for the District of Arizona

No. B-9352-Phx.

In the Matter of
MARYVALE COMMUNITY HOSPITAL, INC.,
Debtor

vs.

THEODOR E. BRATRUD,
Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 9th and 26th days of March, 1964, upon the petition of Fred Foster, Receiver herein, for Temporary Restraining Order and Order to Show Cause against Theodor E. Bratrud and said Respondent's response thereto; Petitioner appearing by his attorney, Donald D. Meyers, Shimmel, Hill, Kleindienst & Bishop, attorneys at law, Phoenix, Arizona, and Respondent appearing by his attorney, Herbert Mallamo, Phoenix, Arizona; the parties having introduced evidence both oral and documentary, and the Court having considered the same, finds the facts and states conclusions of law as follows:

FINDINGS OF FACT

I.

That on or about the 25th day of October, 1962, Maryvale Community Hospital, Inc., an Arizona corporation, and Theodor E. Bratrud, Respondent, made and entered into a certain Agreement in writing, wherein and whereby said Respondent was designated and employed as pathologist for said "Hospital" for a term of five years from said date.

II.

An Order was made and entered on October 28, 1963, in that certain action entitled "Union Title Company, et al. v. Maryvale Community Hospital, Inc.", then pending in the Superior Court of the State of Arizona, in and for the County of Maricopa, being Cause No. 151970 therein, purporting to terminate the aforesaid Agreement and the employment of Respondent, Theodor E. Bratrud, as such pathologist.

III.

That said Agreement of October 25, 1962, between Maryvale Community Hospital, Inc. and Respondent, Theodor E. Bratrud, at all times herein has been, and is now a valid and subsisting Agreement, and that the terms thereof are binding upon Fred Foster, Receiver herein.

IV.

That the Order to Show Cause issued against Respondent, Theodor E. Bratrud for temporary restraining order should be quashed and said temporary restraining order vacated, and that the Petition for Preliminary Injunction against said Respondent should be denied.

CONCLUSIONS OF LAW

I.

That the Agreement of October 25, 1962, by and between the Maryvale Community Hospital, Inc. and Respondent, Theodor E. Bratrud, at all times herein was and is a valid and subsisting Agreement; and that the same is binding upon Fred Foster, Receiver herein.

II.

That the Order to Show Cause issued against Respondent, Theodor E. Bratrud is quashed; that the temporary restraining order issued against said Respondent is vacated; that the Petition for Preliminary Injunction against Respondent, Theodor E. Bratrud, is denied.

DATED: May 7th, 1964.

/s/ ROGER D. FOLEY
Roger D. Foley
United States District
Judge

Appendix VII

(R 357-365)

In the United States District Court
District of Arizona

Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor.

Frank J. Dunning, as Trustee of the Estate of said Debtor,
Petitioner,
vs.
Theodor E. Bratrud,
Respondent.

PETITION TO REJECT AGREEMENT AND TO FILE ACCOUNTING

To: The Honorable Roger D. Foley, United States District Judge:

The petition of Frank J. Dunning respectfully represents:

1. That pursuant to the order of this Court of July 6, 1964, your petitioner was duly appointed Trustee of the Estate of the above Debtor corporation, has duly qualified and is now acting as such Trustee.

2. That the respondent, whose present address is believed to be 8628 North 7th Avenue, Phoenix, Arizona, has heretofore, to-wit: on October 25, 1962, entered into an alleged agreement with the Debtor corporation, Maryvale Community Hospital, Inc., a copy of which is attached hereto as Exhibit "A", and by reference made a part hereof.

3. That your petitioner has determined that it is in the best interests of the estate of the Debtor corporation that this alleged contract be terminated forthwith; that your petitioner has been advised that said alleged contract, presumed to have been executed by the Board of Directors of the Debtor corporation, may have been executed by a Board of Directors not properly constituted and ultra vires; that your petitioner has been informed and, upon such information and belief, represents that the Respondent did not perform the services required to be performed by him pursuant to the alleged contract.

4. That by reason of the great number and diversity of the services performed pursuant to the terms of said alleged contract, over a considerable period of time, the respondent has knowledge of said services and monies received pursuant thereto not known by or readily available to petitioner; that respondent is in a position to render an accounting to this Court as is not otherwise available.

5. That the respondent has heretofore filed his exceptions to the final account and report and petition for allowance of Fred Foster, Receiver in Chapter X proceedings, and petition for order to show cause for reclamation of trust fund; or in alternative for approval and payment of priority claim in the above entitled matter; that in said petition, respondent seeks an order of this Court to obtain possession of the sum of $30,470.95 of alleged trust funds received and held by the Receiver and Trustee; that it is in the best interests of the estate that, prior to any hearing on respondent's petition, this Court first determine whether, in fact, a validly executed contract between respondent and the Debtor corporation exists and, if so, precisely what amounts have been received by respondent and expended by him pursuant to the terms of any such contract.

6. That the alleged contract is not a contract in the public authority.

Wherefore, your petitioner prays that this Court enter its order requiring respondent to appear and show cause, if any he have, on a day certain, why the alleged executory contract should not be terminated pursuant to Section 116, Subsection 1, of Article III, Chapter X, of the Act of Congress relating to Bankruptcy, and why respondent should not be permitted, if said contract is rejected, to be deemed a creditor for his damages as may be shown to the Court by virtue of the rejection of the alleged executory contract, and why respondent should not submit to this Court a verified accounting setting forth the monies received and expended by respondent pursuant to the terms of said contract.

Dated this 22nd day of July, 1964.

/s/ Frank J. Dunning
Frank J. Dunning
Petitioner-Trustee

/s/ John F. Sullivan
John F. Sullivan
Attorney for Trustee
7th Floor Luhrs Tower
Phoenix, Arizona

Copies (2) of the foregoing Petition mailed to United States Securities & Exchange Commission, 821 Market Street, San Francisco, California, this 28 day of July, 1964.

/s/ John F. Sullivan
Attorney for Trustee

EXHIBIT "A"

AGREEMENT

This Agreement made and entered into this 25 day of October, 1962 by and between Maryvale Community Hospital, Inc., an Arizona non-profit corporation, hereinafter designated as Hospital and THEODOR E. BRATRUD, hereinafter designated as pathologist.

WITNESSETH:

WHEREAS, the hospital is desirous of establishing and maintaining a department of pathology and in connection therewith to maintain standards in the practice of pathology which will meet with the requirements of approval by the Joint Commission of Accreditation of Hospitals, the American Society of Clinical Pathologists and the College of American Pathology and

WHEREAS, the pathologist will be a physician duly licensed to practice medicine in the State of Arizona and a recognized specialist in pathology eligible for certification by the American Board of Pathology in pathologic anatomy and/or clinical pathology.

WHEREAS, both parties recognize that the practice of medicine is legally a franchise granted by the State to an individual after rigid technical training and due examination, and it is the desire of both parties that the professional services of the pathologist be made available to the patients in the hospital and to the professional staff of the hospital.

I. THE HOSPITAL COVENANTS AND AGREES AS FOLLOWS:

1. To make adequate provisions for proper and adequate space for the pathology department including but not limited to operating space for technologists and personnel, storage space for supplies and pathological specimens, lab-

oratory space, and quarters for the housing and maintenance of animals as may be required for clinical diagnostic and experimental procedures and to equip such space with the necessary basic equipment and facilities to maintain such department.

2. To act as the billing, accounting and collecting agent for the pathologist for all in-patient and emergency room hospital pathology services and to maintain such books and records as are necessary to provide this service, said books and records to be made available for inspection and copying by the pathologist or his staff at such time and place as shall be mutually convenient to hospital and pathologist or his staff.

3. To provide lighting, heating, janitor service, telephone service and all basic utilities to the space provided for the pathology services.

4. The hospital will remit on the 1st and 15th of each month for the semi-monthly period just prior to each date to the pathologist 80% of all in-patient and emergency room hospital billings for laboratory services, the pathologist or his staff to run and maintain the department of pathology and laboratory as he sees fit, subject to the provisions of this agreement. The pathologist will be reimbursed based upon his records of in-patient services. Such records may be examined by the hospital periodically.

II. PATHOLOGIST COVENANTS AND AGREES AS FOLLOWS:

1. To assume the responsibility for the conduct of the department of pathology and to devote such time as is necessary to provide proper and adequate service and supervision which will meet the needs of the patients and/or the medical staff.

2. To be responsible for matters of general policy, rules, regulations, professional and technical procedures, and the

development of clinical or other research projects within the department of pathology.

3. To be responsible for the prompt performance of all laboratory examinations requested, the preparation of written reports and the retention of such materials as microscopic sections; to keep accurate and complete records, including a proper filing system.

4. To be responsible for the performance of duly authorized autopsies on hospital patients properly admitted, whose deaths are legally regarded as hospital deaths, and to make available promptly for the hospital record, the attending physician and the departmental files, reports including both gross and microscopic findings, and to preerve pertinent tissues, blocks and sections in conformity with established customs and laws at no charge to the hospital.

5. To engage such physicians and technicians and other personnel as are required for the proper functioning of the department and to be responsible for the purchase of all supplies and equipment necessary for the conduct and improvement of the pathology service.

6. To provide, without charge, such pathology services as may be required for the care of bona fide charity patients of the hospital and also that which is necessary to protect patients and personnel from communicable diseases within the hospital.

7. To provide for consultations at operations and for frozen section diagnosis and for consultation with staff physicians.

III. THE PARTIES MUTUALLY COVENANT AND AGREE AS FOLLOWS:

1. For and in consideration of the services to be rendered and the covenants to be performed by the hospital,

pursuant to Section I of this Agreement, the pathologist or his staff agree to reimburse the hospital 20% of the gross billings for the laboratory as and for payment of rent, lights, heat, in-patient bookkeeping and accounting, telephone service and janitor service, and basic utilities. The books and records of the hospital insofar as they relate to the income or fees produced by or earned from the laboratory or the pathologist and his staff shall be subject to the inspection and audit of the pathologist and his staff as above mentioned in Paragraph I Section 2. In the event there is any dispute between the parties hereto concerning the amount of income due and payable to either party hereunder, findings and report of a certified public accountant mutually acceptable to both parties shall be conclusive in such determination.

2. The pathologist or his staff may provide services to patients, citizens and institutions outside the hospital and any remuneration therefore shall belong entirely to the pathologist and his staff, provided, however, that such other professional activities must not interfere with services to the hospital staff and patients as designated herein.

3. The pathologist shall be known and designated as Chief of the Pathology Department and shall have status equivalent to that of any other Chief of Services within the hospital and shall be a member of the medical executive committee the same as other department heads with the pathology services to be a division of the hospital staff equal in all respects to other divisions of the hospital.

4. The pathologist shall be an independent contractor and maintain and operate the department of pathology and the laboratory exclusively under his supervision with the right to make such rules and regulations, to hire and fire personnel necessary for the operation of the laboratory and to decide all matters of policy pertaining to the department

of pathology insofar as these provisions do not directly conflict with any hospital laws, by-laws, provisions, or policies.

5. The pathologist or his staff shall provide for continuing professional service.

6. This agreement shall be applicable and continued in force with any associates or assigns of the pathologist and shall be binding upon the successors and assigns of the hospital.

7. This agreement shall be for a term of five (5) years from this date and shall be deemed to be automatically renewed unless terminated in writing by either party at least 180 days prior to the renewal date.

8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist.

9. Any of the matters contained in this agreement may be altered from time to time by the written consent of the parties to this agreement without in any way effecting the remainder of this agreement.

10. This agreement shall supercede and replace any and all previous agreements entered into by and between Theodor E. Bratrud and the hospital.

In Witness Whereof the parties have caused this agreement to be executed at Phoenix on the 25th day of October, 1962.

MARYVALE COMMUNITY HOSPITAL

By /s/ WILLIAM XUHN— XU—
President

Attest:

/s/ XZœæ&—XZœæ&—XZœæ&—
Secretary

By /s/ T. E. BRATRUD, M.D.
T. E. Bratrud, M.D.

Appendix VIII

(R 366-367)

In the United States District Court
for the District of Arizona

Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor.

Frank J. Dunning, as Trustee of the Estate of said Debtor,
Petitioner,
vs.
Theodor E. Bratrud,
Respondent.

ORDER TO SHOW CAUSE

Upon the annexed petition of Frank J. Dunning, Trustee, presented this 24th day of July, 1964, from which it appears that petitioner should be granted an order rejecting a certain executory contract with respondent herein, Theodor E. Bratrud, and to file an accounting,

It is ordered that Theodor E. Bratrud show cause before me in the Bankruptcy Court on the 8th Floor of the United States Court House at Phoenix, Arizona, on the 3rd day of August, 1964, at 2 o'clock, P.M., or as soon thereafter as counsel can be heard, why the alleged executory contract, Exhibit "A" of petition, should not forthwith be rejected by the Trustee herein, and why he should not file the accounting requested in said petition, and why this Court should not grant said petitioner such other and further relief as is just.

It is ordered that unless good cause is shown that respondent shall, in the event of rejection of the alleged

executory contract herein described, be permited to present to this Court such claim for injuries as may result from the rejection of an executory contract and shall be deemed a creditor of the estate in such amount as shall be determined proper by this Court upon further hearing of this matter.

It is further ordered that service of this Order, and the Petition upon which it is made, shall be determined proper if placed in the mail, postage prepaid, registered mail, addressed to Theodor E. Bratrud at 8628 North 7th Avenue, Phoenix, Arizona, on or before the 27th day of July, 1964, and such service shall be good and sufficient service herein.

Dated this 24th day of July, 1964.

/s/ Roger D. Foley, Jr.

United States District Judge

Appendix IX

(R 343-356)

In the District Court of the United States for the District of Arizona

No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc.,
Debtor.

EXCEPTIONS OF T. E. BRATRUD, M.D. TO THE FINAL ACCOUNT AND REPORT AND PETITION FOR ALLOWANCE OF FRED FOSTER, RECEIVER IN CHAPTER X PROCEEDING, AND PETITION FOR ORDER TO SHOW CAUSE FOR RECLAMATION OF TRUST FUND; OR IN ALTERNATIVE FOR APPROVAL AND PAYMENT OF PRIORITY CLAIM.

Comes now T. E. Bratrud, M. D. and makes and files his exceptions to the Final Account and Report and Petition for allowance of Fred Foster, Receiver in Chapter X proceedings in the above numbered and captioned matter, and Petition for Reclamation of Trust Fund; or in the alternative for apporval and payment of priority claim.

I.

Excepts to the inference contained in Paragraph 6, Page 3 of said Account and Report to the effect that the Final Account and Report of the Co-Receivers in the Superior Court Action pending in the Superior Court of the State of Arizona, in and for the County of Maricopa was settled and approved on December 11, 1963, and in this connection your Petitioner alleges that objections to said Final Account and

Report were made for and on behalf of Dr. T. E. Bratrud, which said objections have not as yet been ruled upon; and that said Final Account and Report has not to date hereof been settled or approved insofar as the status of the account of your Petitioner is concerned, or the amounts which are due and payable to said Petitioner in said proceeding.

II.

Excepts to that portion of II, 1(b), Page 5 of said Report, commencing with line 27 through to line 33 thereof, to the effect that the obligations of the Hospital including notes payable and accounts payable have been reduced to $66,661.52, for a reduction in five months of $86,245.59, in that said reduction fails to consider or reflect the fact that all of the income received by said Hospital from the income from billings for laboratory and pathological services rendered by T. E. Bratrud, dba Maryvale Medical Center Laboratory were commingled with the funds of said Hospital and were converted and wrongfully used by said Fred Foster, Receiver, in the payment of said Hospital obligations; and that further said Account and Report fails to properly reflect an account payable due to the said T. E. Bratrud for and upon laboratory and pathological services rendered during such period; that as hereinafter shown, the said Fred Foster has converted and applied to the payment of Hospital obligations money and funds belonging to your Petitioner in the amount of $31,056.82, said sum being more particularly set forth in Exhibit "A" attached hereto and by this reference made a part hereof for all purposes.

III.

Exception is further made to all references of said Receiver to his acts and conduct with respect to the Pathologi-

cal Laboratory as set forth in II, 2, Page 8, lines 5 through 21; II, 5, Page 9 lines 18 through 25 upon the grounds that said allegations and conclusions of said Receiver are contrary to the fact, and are made for the express purpose of prejudicing your Petitioner in his attempt to secure reclamation or reimbursement of the funds properly due him for laboratory and pathological services rendered to the Hospital during the period of his administration as such Receiver.

IV.

Exception is further made to that portion of said Account and Report designated as III, 6, 7, 8 and 9 at Pages 11 and 12, upon the grounds that the claims of those persons furnishing supplies and services to the Pathological Department; the default on equipment contracts; and delinquency in the payment of personal property and payroll taxes due to the State of Arizona and to the Internal Revenue Service, were directly and proximately caused by the wilful and malicious breach of Petitioner's contract with Maryvale Community Hospital, Inc. by said Fred Foster purporting to act as such Receiver; that at all times during which said breach existed, said Receiver and said Hospital was indebted to your Petitioner in varying amounts, greatly in excess of the amounts due for such supplies, services, payments upon equipment contracts and due upon taxes as aforesaid; and that but for said breach of contract, with the resulting impoundment of your Petitioner's earnings and money due him for services and pathological and laboratory services rendered to the patients of said Hospital during the period of said receivership, all of said claims would have been satisfied when due and payable.

V.

Exception is further made to that portion of IV, 3, at Pages 13 and 14, also with respect to the defaults on equipment contracts, claims of suppliers and personal property taxes and taxes due the Internal Revenue Service, all of which were directly and proximately caused by the wilful breach of Petitioner's contract with Maryvale Community Hospital, Inc.; that said Receiver's acts with respect to said Laboratory and to the termination of Petitioner's contract with said Hospital and the injunctive processes issued out of this Court against your Petitioner were determined adversely to said Receiver, all as is more particularly shown by the records and files herein contained.

VI.

That notwithstanding that the said Fred Foster as such Receiver was ordered and directed by this Court to prepare and file herein a full, complete and accurate accounting of his administration of such receivership, and of the accounts and dealings between said Hospital and T. E. Bratrud dba Maryvale Medical Center Laboratory, Petitoner herein, the said Fred Foster has failed and neglected to prepare such accounting; and that the Account and Report so prepared and filed by him herein is incorrect, inaccurate, misleading and untrue insofar as it purports to reflect the condition of the account between said Hospital and your Petitioner. In this regard your Petitioner has caused an audit and analysis to be made of Exhibits "M" and "N" attached to said Receiver's report reference to Maryvale Medical Center Laboratory by George L. Sheppard & Co., Certified Public Accountants, 349 Valley National Bank Building, Mesa, Arizona, for the period August 1, 1963, through and including April 30, 1964; that said audit and analysis is attached

hereto marked Exhibit "1" and by this reference made a part hereof for all purposes; that your Petitioner specifically adopts and incorporates herein the computations contained in said Exhibit "1" and the notes of the said George L. Sheppard with reference to adjustments, additions and deletions to said Receiver's accounts, the same being made necessary by the reason of the failure and refusal of the said Fred Foster to comply with the previous orders of this Court to reinstate the contract existing between Maryvale Community Hospital, Inc. and your Petitioner, and to make the payments due to your Petitioner under and pursuant to said contract; that as shown by said audit and analysis Exhibit "1" attached hereto, there was due, payable and unpaid to your Petitioner as of July 7, 1964, the sum of $31,056.82; that subsequent to said date, Your Petitioner has been reliably informed and advised, and therefore alleges that the said Hospital has paid to the Internal Revenue Service, and it is entitled to credit upon its account the additional amount of $585.87 representing $513.22 tax, plus $72.65 interest thereon, reducing the amount due and payable to your Petitioner to the sum of $30,470.95 as of date hereof.

VII.

That under and pursuant to the terms and conditions of contract existing between Maryvale Community Hospital, Inc. and Thedor E. Bratrud, Petitioner herein, dated October 25, 1962, a copy of which said contract is on file in these proceedings, said Maryvale Community Hospital, Inc. agreed:

> "2. To act as the billing, accounting and collecting agent for the pathologist for all in-patient and emergency room pathology services and to maintain such books and records as are necessary to provide this

service, said books and records to be made available for inspection and copying by the pathologist or his staff at such time and place as shall be mutually convenient to hospital and pathologist, or his staff."

and further:

"4. The hospital will remit on the 1st and 15th of each month for the semi-monthly period just prior to each date to the pathologist 80% of all in-patient and the emergency room hospital billings for laboratory services, the pathologist or his staff to run and maintain the department of pathology as he sees fit, subject to the provisions of this Agreement. The pathologist will be reimbursed based upon his records of in-patient service. Such records may be examined by the hospital periodically."

That in the premises the entire sum of $30,470.95 shown to be due Petitioner as hereinabove related were and are the funds and property of your Petitioner; that said sum at all times herein, were and are held, in trust by said Receiver and said Hospital for the use and benefit of your Petitoner; and as such your Petitioner is entitled to reclamation thereof, together with interest thereon at the rate of 6% per annum until paid; that in the alternative if said monies are determined or considered by this Court not to be trust funds belonging to your Petitioner and retained by said Receiver and said trustee for the use and benefit of said Petitioner, then the payment of said sum of $30,470.95 is entitled to priority by reason of the fact that Petitioner furnished and supplied laboratory and pathological services to the said Fred Foster as such Receiver and said Hospital in and during the course of said receivership; and that the payment of said sum should be made as an expense of administration.

That as shown upon the balance sheet of said Hospital for the period ending April 30, 1964, there was included among the assets of said Hospital, "Cash in Bank— $84,296-.92"; said amount includes the sum of $30,470.95 collected by said Hospital upon laboratory and pathological services rendered to patients thereof, for the use and benefit of Petitioner herein, after the deduction of all charges, credits and offsets as hereinabove set forth.

WHEREFORE, your Petitioner, T. E. BRATRUD dba MARYVALE MEDICAL CENTER LABORATORY, prays the Court as follows:

1. That Petitioner's exceptions to the Final Account and Report of FRED FOSTER, be allowed, settled and approved.

2. That an Order to Show Cause issue herein requiring the said FRED FOSTER and FRANK J. DUNNING to appear and show cause why an order of reclamation should not be granted allowing and permitting your Petitioner to obtain possession of the sum of $30,470.95, representing trust funds received and held by said Receiver and trustee for the use and benefit of said Petitioner; or in the alternative, requiring the said FRED FOSTER, Receiver, and/or FRANK J. DUNNING, trustee herein, to appear and pay forthwith to your Petitioner the sum of $30,470.95 as a priority claim due, owing and payable to your Petitioner as an expense of administration.

3. For such other and further relief as may be meet and proper in the premises.

/s/ HERBERT MALLAMO
Herbert Mallamo,
Attorney for Petitioner

State of Arizona
County of Maricopa—ss.

T. E. BRATRUD, being first duly sworn upon his oath, deposes and says that:

He is the Petitioner in the foregoing Exceptions to the Final Account and Report and has read the same and knows the contents thereof; that the matters and things therein stated are true of his own knowledge, except as to those things alleged upon information and belief, and as to them, he believes them to be true.

/s/ T. E. BRATRUD
T. E. Bratrud

Subscribed and sworn to before me this 15th day of July, 1964.

/s/ MARY B. DOOLEY
Notary Public

My Commission expires:
December 5, 1964.

GEORGE L. SHEPPARD & CO.
CERTIFIED PUBLIC ACCOUNTANTS
349 VALLEY NATIONAL BANK BUILDING
MESA, ARIZONA
July 7, 1964

Dr. T. E. Bratrud
8628 N. 7th Avenue
Phoenix, Arizona

Dear Dr. Bratrud:

We have reviewed books and records of Maryvale Community Hospital as they pertain to a statement of account between the Hospital and Maryvale Medical Center Laboratory, which statement was prepared by the Hospital.

You have requested that we adjust this statement where necessary to correspond with the facts. In compliance with this request we submit herewith a revised statement together with our explanatory notes.

We have been guided in making these revisions by the original agreement between you and the hospital and by the established procedures in effect prior to the development of differences between you and the Hospital Receiver last fall. Our aim has been to determine the amount that should be due you in order to properly compensate you for laboratory services had you been permitted to operate the laboratory under the original agreement without undue interference. Accordingly, we have attempted to interpret the contract strictly.

Except for the 7% deduction which was made in laboratory settlements from the beginning and which we understand is an allowance for bad debt losses, we have disallowed all claims of the Hospital not specifically spelled out in the agreement. We have also disallowed some items charged by the Hospital to supplies which do not appear to be properly classified. These may be legitimate charges

against the laboratory but from the information available to us it would appear that they are not laboratory supplies. We are including herewith a list of all charges to laboratory supplies including the items disallowed, which we have marked by asterisks. It would appear desirable that the balance of $4,540.91 be allowed subject to the specific understanding that the Hospital be responsible for payment of invoices involved if payment has not already been made.

If we can be of any further assistance to you in this matter please call us.

Very truly yours,

GEORGE L. SHEPPARD & Co.

/s/ GEORGE L. SHEPPARD
George L. Sheppard
Certified Public Accountant

MARYVALE MEDICAL CENTER LABORATORY

Statement of Accounts with Maryvale Community Hospital

	Amount per Hospital Statement August 1, 1963 to April 30, 1964	Adjustment Explanation	Adjustment Increase Decrease	Adjusted Amount
In Patient revenue from hospital	$179,301.86			$179,301.86
Deduct: 7% above (less EKGS)	12,212.97			12,212.97
20% of difference	32,451.44			32,451.44
	$134,637.45			$134,637.45
Write off	14,446.44	(Note 1)	($14,446.44)	—
	$120,191.01		$14,446.44	$134,637.45
Less amount paid	63,038.81			63,038.81
Amount not paid direct	$ 57,152.20		$14,446.44	$ 71,558.64
Costs & expenses incurred by hospital for laboratory:				
Equipment	$ 5,000.00	(Note 2)	($ 4,000.00)	$ 1,000.00
Personal—Bratrud	766.89	(Note 3)	(142.16)	624.73
Good Samaritan Hospital Lab.	10.00			10.00
CIT Payments	3,343.60			3,343.60
Employment Security Comm.	200.07			200.07
Accounts Payable prior to 1-1-64	140.00			140.00
Tax lien—Internal Revenue	5,468.97	(Note 10)	(196.85)	5,272.12
Telephone—Private line	58.58	(Note 4)	(58.58)	
Personal property tax	1,313.80			1,313.80
Payroll taxes and handling	1,906.48	(Note 5)	(1,175.34)	731.14
Accounting fees	2,039.42	(Note 6)	(2,039.42)	
Lab consultant fees	5,834.00			5,834.00
Lab salary	19,064.80			19,064.80
Lab supplies	4,901.48	(Note 7)	(360.57)	4,540.91
Total Costs & Expenses Incurred	$ 50,048.09		($ 7,972.92)	$ 42,075.17
Balance	$ 7,104.11		$22,419.36	$ 29,523.47
Collected out patient revenue	820.72	(Note 8)		820.72
Addback improper charges by Hospital against out patient revenue		(Note 9)	712.63	712.63
	$ 7,924.83		23,131.99	$ 31,056.82

MARYVALE MEDICAL CENTER LABORATORY

Notes to
Statement of Accounts with
Maryvale Community Hospital

Note 1. This adjustment to the original billing has been made arbitrarily by the receiver allegedly to adjust for Blue Cross and Industrial Insurance discounts. No records are maintained of such discounts on laboratory billings and consequently an arbitrary computation has been made and applied over and above the 7% adjustment. The contract does not provide for this adjustment and Dr. Bratrud has not agreed to it.

Note 2. Dr. Bratrud purchased equipment from the hospital in 1962 for an agreed price of $5,000.00 payable $1,000.00 per year beginning December 31, 1963. The Receiver is claiming the full $5,000.00 on the pretext that the $1,000.00 due December 31 was not paid when due and therefore the full amount is payable under the agreement. The amount due on December 31, is accepted, the balance is disallowed for the following reasons:

1. The contract does not provide for acceleration.
2. The Receiver owed Dr. Bratrud more than enough to have paid this $1,000.00 on December 31 when it was due.

Note 3. The personal charge to Dr. Bratrud of $766.89 included a charge for special nursing totaling $242.16. This charge was questioned at the time by Dr. Bratrud, since these were not actually special duty nurses, but regular nurses assigned to this duty who were not busy elsewhere. This matter was settled between Dr. Bratrud and Mr. Kennedy, the hospital controller at the time, by Dr. Bratrud agreeing to pay $100.00 for this charge. The difference of $142.16 is deducted here.

Note 4. The Receiver is making a charge of $58.58 for private line to hospital. A similar charge is made and charged to supplies of $76.13. The agreement states the hospital is to provide telephone service. Dr. Bratrud paid for his own private lines.

Maryvale Medical Center Laboratory Notes to Statement of Accounts with Maryvale Community Hospital Page 2

Note 5. The Receiver has claimed a flat 10% of payroll for taxes and handling. The only taxes the hospital is subject to is employer's FICA tax and Industrial Insurance. The actual tax on the payroll is computed as follows:

FICA tax $19,064.80 × .03625 =	$691.10
Industrial Insurance $19,064.80 × .0021 =	40.04
	$731.14

Note 6. The hospital charged 5% of total lab charges for the four months of January, February, March, and April as accounting fees. This was reduced by the charge for payroll taxes and handling. There were personnel in the laboratory who could have and who would have performed these services, therefore, this amount is being rejected.

Note 7. The following items charged to lab supplies are disallowed, as not being proper hospital supply items, or as representing charges for services which under the agreement the hospital is required to furnish:

Telephone	$ 76.13
Food	9.60
Linen	23.34
Maintenance	150.00
Utilities	5.12
Repairs office machines	11.58
Coffee Shop charges	12.96
Housekeeping supplies	71.84
	$360.57

Note 8. Hospital accountants advised that during the period of management by the hospital the in patient and out patient revenue of the laboratory was combined and has been included in the total revenue figure for the first four months of 1964. They said that amount shown on the Receiver's book as out patient revenue collected, represented collections on accounts receivable outstanding December 31, 1963 when the hospital took over.

Maryvale Medical Center Laboratory Notes to Statement of Accounts with Maryvale Community Hospital Page 3.

Note 9. A schedule of out patient revenue prepared by hospital accountants reflects that out patient revenue which was included as part of in patient amounted to $2,783,70. Since this amount was included as part of in patient revenue, it was improperly charged 7% and 20% by the hospital. According to the contract all out patient revenue was Dr. Bratrud's. The improper charge by the hospital is compiled as follows:

Total amount of our patient revenue	$2,783.70
7% of above	194.86
Difference	2,588.84
20% of above	517.77
Balance allowed Bratrud	2,071.07
Amount Bratrud should have received	2,783.70
Amount allowed by hospital per above	2,071.07
Additional amount due Bratrud	712.63

Note 10. As the result of an internal revenue levy for unpaid payroll taxes, Dr. Bratrud was subjected to interests, fees, and penalties of $196.85 which would not have been necessary had he been reimbursed for laboratory services when due.

MARYVALE MEDICAL CENTER LABORATORY SCHEDULE OF CHARGES TO SUPPLY ACCOUNT BY MARYVALE COMMUNITY HOSPITAL

Month	Supplies	Amount
2/29	Petty Cash	$ 33.01
	Out Patient ledger for supplies charged by job	10.88
	Scientific Products	19.62
	Clico Lab	81.00
	Scientific Products	108.69
	Balin Laboratories	5.20
	Maryvale Foto Shop	13.15
	Charles Pfieser & Co.	11.40
	Sanborn Co.	12.50
	E. G. Stein Hilber & Co.	8.52
	Scientific Products	32.53
	Store Room charge	46.82
	Pharmacy	1.00
	Bolin Lab	75.70
	Howard Stofft	2.14
	Top Show	8.48
	Loftins	213.48
	Charles Pfieser	22.80
	Sanborn Co.	23.10
	Scientific Products	1,034.49
	Tonapah Water Co.	29.00
	Transcopy Co.	97.80
	Van Waters & Roger	3.75
	Western Surgical	48.54
3/31	Arizona Janitor Supply	1.00
	Beckman Instrument	88.95
	Bolin Lab & Vern Bolin	53.80
	Clico Lab	251.50
	Warren E. Collins	26.98
	Ortho Pharmaceutical	80.60
	Charles Pfieser	22.80
	Sanborn	100.65
	Scientific Products	802.15
	E. G. Steinhilber	8.52
	Western Surgical	104.36
	Whitney P	9.00
	Clico Lab	150.85
	Clico Lab	39.20
	Petty Cash	24.72
	Transcopy	(1.55)
	Inpatient Lab	293.50
	Diagnostic Lab	17.50
	Memorial Hospital	10.00
	Telephone	76.13*

	Food	9.60*
	Linen	23.34*
	Maintenance	150.00*
	Utilities	5.12*
	Repairs-Office Machines	11.58*
	Pharmacy Supplies	6.60
	C.S.R. Supplies	6.00
	Store Room Supplies	78.60
	Coffee Shop Charge for March	9.63*
4/30	B.I.O. Science Lab	70.00
	Affiliated Pathology	173.25
	Petty Cash	20.81
	Coffee—April	3.33*
	Central Supply	10.00
	Store Room	147.52
5/1	House Keeping Supplies	71.84*
		$4,901.48

Appendix X

(R374-375)

In the United States District Court
District of Arizona

Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc.,
an Arizona corporation,
Debtor.

ORDER PERMITTING TRUSTEE TO REJECT ALLEGED EXECUTORY CONTRACT

At Phoenix, in said District, on the 11 day of August, 1964.

The petition of Frank J. Dunning, Trustee of Maryvale Community Hospital, Inc., the above named Debtor, for permission to reject the alleged agreement between the Debtor corporation and Theodor E. Bratrud, M.D., dated October 25, 1962, having been heard on the 3rd day of August, 1964, and notice of said hearing having been given as prescribed by this Court in its order of July 24, 1964, to Theodor E. Bratrud, M.D., and after hearing Mr. John F. Sullivan, attorney for said Trustee, in favor of said petition, and Mr. Herbert Mallamo, attorney for said Dr. Bratrud,

Now, upon said petition and all the proceedings had before me at the said hearing, and it appearing that the best interests of the estate require that the alleged executory contract be terminated,

It is ordered that Frank J. Dunning, Trustee of Maryvale Community Hospital, Inc., Debtor, be, and he is hereby, permitted to reject the alleged agreement between the said Debtor and Theodor E. Bratrud, M.D., dated October 25,

1962, and It Is Further Ordered that Theodor E. Bratrud, M.D., without prejudice by reason of the foregoing, be permitted to present to this Court such claim or claims for injuries as may result from the rejection of the alleged executory agreement, and may be deemed a creditor of the estate in such amount as shall be determined proper by this Court upon further hearing of this matter.

It Is Further Ordered that the entry of this order shall be deemed to constitute a rejection of the said alleged agreement.

Dated this 11th day of August, 1964.

/s/ ?????

Referee in Bankruptcy

Copies of the foregoing Order
mailed to:

Mr. Herbert Mallamo, Attorney
for Theodor E. Bratrud, M.D.,
Luhrs Building, Phoenix, Arizona.

Mr. John G. Brennan, Attorney for
Bondholders Committee of Maryvale
Community Hospital, Inc., 3800 North
Central Avenue, Phoenix, Arizona.

Mr. Charles M. Duecy
44 East Indian School Road
Scottsdale, Arizona.

Securities & Exchange Commission
821 Market Street
San Francisco, California

this 12 day of August, 1964.

/s/ JOHN F. SULLIVAN
Attorney for Trustee

Appendix XI

(R 415-420)

In the United States District Court
for the District of Arizona

In Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor.

Frank J. Dunning, as Trustee of the Estate of said Debtor,
Petitioner,

vs.

Theodor E. Bratrud,
Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 3rd and 4th days of August, 1964, before the Hon. Russell B. Taylor, Special Master and Referee, upon the Chapter X Receiver's (Fred Foster) Final Account and Report and Petition for Allowance; and the exceptions of T. E. Bratrud, M.D. to said report, combined with his Petition for Reclamation of Trust Fund or in the alternative for approval and payment of priority claim; together with the Petition of Frank J. Dunning, as Trustee, to reject agreement and to file accounting respecting the contract of and services rendered by the said T. E. Bratrud, M. D. thereunder; the Receiver, Fred Foster, appearing in person and by his attorney, Donald D. Meyers, Shimmel, Hill, Kleindienst & Bishop, attorneys at law, Phoenix, Arizona; the Trustee, Frank J. Dunning, appearing in person and by his attorney, John F. Sullivan, Respondent T. E. Bratrud appearing in person and by his attorneys, Herbert Mallamo and Robert G.

Mooreman; Mr. Allen Corotto, appearing for the U. S. Securities and Exchange Commission; and Mr. John G. Brennan appearing as attorney for the Maryvale Community Hospital Bondholders Committee; the parties having introduced evidence, both oral and documentary, and the Court having considered the same, finds the facts and states Conclusions of Law as follows:

FINDINGS OF FACT

1. That on or about the 25th day of October, 1962, Maryvale Community Hospital, Inc., an Arizona corporation, and Theodor E. Bratrud, made and entered into a certain agreement in writing, wherein and whereby said Respondent Theodor E. Bratrud, was designated and employed as Pathologist for said "Hospital" for a term of five years from said date.

2. That said Agreement required and the said Theodor E. Bratrud furnished professional and laboratory services under and in accordance with said Agreement for the period August 1, 1963 to and including the 30th day of April, 1964, to the total and agreed amount of $179,301.86, and therefore undisputed.

3. That Maryvale Community Hospital was required to and did act as the billing, accounting and collecting agent for the said Theodor E. Bratrud during the period aforesaid and was entitled to retain and withhold only the sum of $44,664.41 as its pro-rata share of such receipts under and pursuant to the terms of said Agreement.

4. That the Chapter X Receiver, Fred Foster, failed, neglected and refused to honor or observe the terms and conditions of said Agreement or to allow and permit the Maryvale Community Hospital, Inc. to fulfill or comply with said Agreement during the period from August 1, 1963 to

and including the 30th day of April, 1964; and caused, permitted and allowed said Agreement to be breached in that payments to the said T. E. Bratrud were not made at the time and in the manner set forth in said Agreement.

5. That the Final Account and Report of Fred Foster, Chapter X Receiver is incorrect, inaccurate and erroneous as respects the account with the said Theodor E. Bratrud Agreement and is disallowed in the following particulars and amounts:

Write off (Blue Cross & Blue Shield)	$14,446.44
Bratrud-Maryvale Equipment Purchase Agreement	$ 4,000.00
Interest and penalties on Income Tax Levy	$ 196.85
Telephone charge	$ 58.58
Payroll taxes and handling	$ 1,175.34
Accounting fees	$ 2,039.42
Supplies (Improper charges to Laboratory)	$ 360.57
Out-patient fees collected—from which Hospital deducted 27%	$ 712.68
Total	$23,131.99

for the reason that said items are not authorized or permitted under the terms of the Agreement between the parties; and are contrary to the specific Agreements between the parties; that several of said items are for services required to the rendered and supplied by Maryvale Community Hospital as part of the consideration for its compensation under said Agreement; or are interest penalties proximately caused by reason of the default of the Hospital in failing to make payments to T. E. Bratrud under and pursuant to said Agreement.

6. That Maryvale Community Hospital, Inc. has received and retains in its possession money belonging to T. E. Brat-

rud in the sum of $31,056.82 up to and including the date of said Receiver's Final Account and Report.

7. That subsequent to the filing of said Receiver's Final Account and Report, Maryvale Community Hospital, Inc. paid to the U. S. Internal Revenue Service the sum of $585.87 for and upon withholding tax due and unpaid upon wages of laboratory employees of T. E. Bratrud; that said amount was represented by $513.22 taxes and $72.65 interest and penalties; that in this regard, Fred Foster, is entitled to an additional $513.22 credit on his Final Account and Report and the sum of $72.65 is disallowed as being penalty and interest directly caused by said Receiver's failure to allow or permit Maryvale Community Hospital, Inc. to fulfill or comply with the terms of said Agreement.

8. That there is now due, owing and unpaid to Theodor E. Bratrud, after the allowance of all just credits and offsets, the sum of $30,543.60.

9. That the entire amount of $30,543.60 was earned by T. E. Bratrud as aforesaid and during the period Fred Foster acted as Receiver in the State of Arizona Superior Court proceedings and in the Chapter X proceedings and constitutes an administration cost; and further that at all times during said period, Maryvale Community Hospital was acting as the agent of Theodor E. Bratrud in receiving and collecting said amount; and that said amount is identified and capable of segregation as trust funds belonging to Theodor E. Bratrud in the possession of said Maryvale Community Hospital, Inc.

10. That at all times the Agreement of October 25, 1962, between T. E. Bratrud and Maryvale Community Hospital, Inc. was heretofore held to be a valid and subsisting contract binding upon the parties thereto, and the said Fred Foster, Receiver, and that the same was by order of this Court terminated on the 3rd day of August, 1964, without

prejudice to T. E. Bratrud's right to claim or to apply to this Court for loss, injury or damage sustained by him thereby.

CONCLUSIONS OF LAW

1. That the exceptions of T. E. Bratrud, to the Final Account and Report of Fred Foster, Receiver in this Chapter X proceeding reference to the Pathological Laboratory contract of October 25, 1962, with Maryvale Community Hospital, Inc. are allowed and sustained in the sum of $23,131.99.

2. That T. E. Bratrud is entitled to recover the sum of $30,543.60 of and from Maryvale Community Hospital, Inc.; together with interest thereon at the rate of 6% from the 30th day of April, 1964, until paid.

3. That Maryvale Community Hospital, Inc. holds the sum of $30,543.60 in its possession in trust, for the use and benefit and for and on behalf of Theodor E. Bratrud.

4. That Theodor E. Bratrud is entitled to an order of reclamation against Maryvale Community Hospital, Inc. and Frank J. Dunning, Trustee for the sum of $30,543.60 together with interest thereon of the rate of 6% per annum from the 30th day of April, 1964, until paid

5. That the Agreement of October 25, 1962, by and between Maryvale Community Hospital, Inc. and Theodor E. Bratrud was terminated and rejected at the request of Frank J. Dunning, Trustee, on the 3rd day of August, 1964; and the Court expressly reserves jurisdiction to hear and determine the injury and damages sustained or incurred by Theodor Bratrud by reason thereof.

Dated this 27th day of January, 1964.

/s/ RUSSELL B. TAYLOR
Russell B. Taylor, Referee in Bankruptcy

Appendix XII

United States Court of Appeals
For the Ninth Circuit

No. 25,500

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor.

Frank J. Dunning, as Trustee of the Estate of Maryvale Community Hospital,
Appellant,
vs.
Theodor E. Bratrud,
Appellee.

[February 11, 1972]

Appeal from the United States District Court for the District of Arizona

Before: Ely and Hufstedler, Circuit Judges, and Ferguson,* District Judge.

Per Curiam:

This case arises out of the Chapter X bankruptcy proceedings involving Maryvale Community Hospital, Inc., which are set forth in the opinion of this court filed this date entitled, "In the Matter of Maryvale Community Hospital, Inc., an Arizona corporation, Debtor; Health Facilities Planning Council, an Arizona nonprofit corporation, Appellant v. Frank J. Dunning, as Trustee of the

*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

Estate of said Debtor, Appellee; Gary K. Nelson, the Attorney General of the State of Arizona, Appellant v. Frank J. Dunning, as Trustee of the Estate of said Debtor, Appellee", Numbers 25,586 and 25,587.

Here, the appeal is from a judgment entered in those proceedings by the district court in favor of Dr. Theodor E. Bratrud against the Chapter X trustee in the amount of $90,000. We reverse.

The following relevant facts govern this appeal:

1. On October 25, 1962, Dr. Bratrud, appellee herein, and Maryvale Hospital executed an agreement pursuant to which Dr. Bratrud became the pathologist for the hospital for a term of five years.

2. In July, 1963, upon a default in payments to the hospital's bondholders, the indenture trustee filed a state court action for an accounting and the appointment of a receiver to manage the hospital.

3. On July 31, 1963, co-receivers, one of which was Fred Foster, were appointed by the state court.

4. The next day, five of the bondholders filed a petition in federal district court for reorganization of the hospital under Chapter X of the Bankruptcy Act.

5. On November 26, 1963, the state court action was dismissed, and pending the approval of the Chapter X petition, Mr. Foster was appointed receiver of the hospital by the district court.

6. On May 11, 1964, the district court approved the Chapter X petition and appointed Mr. Roland Wilpitz as trustee. Subsequently, Mr. Wilpitz resigned, and Mr. Dunning, the appellant herein, was appointed as his successor.

7. Meanwhile, while he was the interim Chapter X receiver, Mr. Foster filed a petition in the district court alleging that during the previous state court receivership disputes had arisen between the state receivers and Dr.

Bratrud concerning the termination of the pathology contract. Mr. Foster sought an order to restrain Dr. Bratrud from performing any activities at the hospital.

8. On February 18, 1964, the district court issued a temporary restraining order preventing Dr. Bratrud from occupying the pathology laboratory, and an order to show cause why a preliminary injunction should not be granted.

9. After a trial, a judgment was entered which set forth:

(a) Dr. Bratrud and the hospital entered into the pathology contract on October 25, 1962.

(b) On October 28, 1963, in the state court action by the indenture trustee, an order was made purporting to terminate the contract.

(c) However, the contract was still in full force and effect and binding upon Mr. Foster as the Chapter X receiver.

(d) The temporary restraining order was vacated and the petition for an injunction was denied.

10. Shortly thereafter, on June 15, 1964, Mr. Foster filed a final account and report and petition for allowance of fees. The district court referred these matters for hearing to the bankruptcy referee, as special master in the Chapter X proceeding. Dr. Bratrud filed exceptions to Mr. Foster's accounting and petitioned the court for the payment of the sum of $30,470.95 as the sum due him under the contract from August 1, 1963, though April 30, 1964.

11. On July 24, 1964, Trustee Dunning filed a petition to terminate the contract between Dr. Bratrud and the hospital pursuant to Section 116(1) of Chapter X of the Bankruptcy Act.

12. On August 11, 1964, an order was entered which permitted the trustee to terminate the contract, effective

August 3, 1964, and, pursuant to Section 202, authorized Dr. Bratrud to present such claims for damages as he might suffer as the result of the rejection of the contract. The order provided that he be deemed a creditor in such amount as the court may subsequently determine. Dr. Bratrud at no time objected to the order permitting Trustee Dunning to reject the contract.

13. On February 9, 1965, the referee, with reference to Foster's accounting and Dr. Bratrud's claim in that proceeding, issued his order finding that Dr. Bratrud was entitled to the sum of $30,543.60 as money due him under the pathology contract from August 1, 1963 through April 30, 1964, and ordered Trustee Dunning to pay Dr. Bratrud that sum. Dr. Bratrud was paid such amount.

14. All of the preceding judgments and orders have become final.

15. On May 25, 1966, Dr. Bratrud filed a petition for and order to show cause why Trustee Dunning should not pay damages for rejection of the pathology contract.

16. The district court referred this matter to the referee for hearing and determination. On June 8, 1966, the referee issued an order directed to Trustee Dunning to show cause why Dr. Bratrud's damages should not be paid out of the debtor's assets.

17. Trustee Dunning then moved to quash this order upon the ground, first, that the district judge had not fixed the time pursuant to Sections 196 and 197 of Chapter X for filing proofs of claims of creditors and that Bratrud, an unsecured creditor at best, was seeking a priority over secured creditors, and his petition was not timely; and, secondly, that the pathology contract had been assigned by Dr. Bratr ıd prior to the time for which he sought compensation and Dr. Bratrud, therefore, had no rights under it.

18. The referee conducted an evidentiary hearing on June 29 and 30, 1966, and then issued an order which determined that:

(a) On April 28, 1964, Dr. Bratrud had voluntarily assigned all his rights in the contract to Dr. Judson A. Davidson, which assignment became effective May 1, 1964.

(b) Neither Dr. Bratrud nor the debtor hospital had terminated the contract prior to that assignment.

(c) Dr. Bratrud wrote to Trustee Dunning that his pathology contract with the hospital had been terminated by mutual agreement.

(d) As the contract had been assigned by Dr. Bratrud prior to the order authorizing rejection, he could not be and was not damaged by the rejection.

19. Dr. Bratrud then filed a petition for review of the referee's finding. The sole issue certified to the district court was the finding by the referee that Dr. Bratrud's assignment of his contract was voluntary.

20. The district court, on review of the record, held that Mr. Foster, during the time that he was the state court co-receiver and federal court receiver, had breached the contract by his actions in preventing Dr. Bratrud from performing under it and evicting Dr. Bratrud from the hospital. The court held that because of Receiver Foster's acts, Dr. Bratrud was forced economically to assign the contract to Dr. Davidson, and the assignment was not voluntary as the referee had found. The district court entered a judgment vacating the referee's order and awarding Dr. Bratrud the sum of $90,000 against Trustee Dunning. This figure was determined by a formula for liquidated damages in the contract. It is from that judgment that the trustee appeals.

Section 116(1) of Chapter X of the Bankruptcy Act (11 U.S.C. § 516(1)) provides that "upon the approval of a petition, the judge may . . . permit the rejection of executory contracts of the debtor . . . ." Section 202 (11 U.S.C. § 602) provides that "In case an executory contract shall be rejected pursuant . . . to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall . . . be deemed a creditor".

After a court has approved a Chapter X reorganization petition, the trustee appointed in that proceeding must within a reasonable time recommend to the court whether to adopt or to reject the debtor's executory contracts. *Philadelphia Co. v. Dipple*, 312 U.S. 168 (1941). By the terms of Section 116(1), the power to reject such contracts resides only in the judge before whom the reorganization proceeding is pending, and not in the receiver, the trustee or the referee to whom the proceeding may be generally referred. *Matter of Cheney Brothers*, 12 F. Supp. 605 (D. Conn. 1935). Where a contract is rejected pursuant to Section 116(1), the rejection is effective immediately and for all purposes. 6 Collier, *Bankruptcy* ¶ 3.24[1], at 591-92 (1969). A rejection constitutes a breach of the contract which gives rise to a cause of action in the other party for damages. *Workman v. Harrison*, 282 F.2d 693 (10th Cir. 1960); *Matter of United Cigar Stores Co. of America*, 89 F.2d 3 (2nd Cir. 1937). By virtue of Section 202, any person injured by the rejection is deemed a creditor of the debtor holding a provable claim which will be treated on a parity with other similar claims. *Matter of Greenpoint Metallic Bed Co., Inc.*, 113 F.2d 881 (2nd Cir. 1940).

Applying these principles, it is clear that the district court erred in awarding Dr. Bratrud $90,000. We begin

with the fact that the pathology contract was in full force and effect until it was rejected by the order of August 11, 1964. Prior to that time Receiver Foster had petitioned to exclude Dr. Bratrud from the hospital. However, the district court found specifically that the state court order which purported to terminate the contract was invalid, and that the contract was in full force and effect. Therefore, that part of Section 202 which refers to an executory contract having been rejected by a "receiver in equity in a prior pending proceeding" is not applicable to this case. Furthermore, the order of August 11, 1964, permitting the trustee to reject the contract, was in itself an implicit finding that the contract was still in effect on that date.

Dr. Bratrud does not challenge the finding of the referee, which was not found otherwise by the district court, that Dr. Bratrud assigned all his right, title and interest in the pathology contract to Dr. Davidson for valuable consideration on April 28, 1964. He does not contend that the assignment is voidable, and he has taken no action to vacate that assignment. It thus appears, as the referee found, that Dr. Bratrud had no right in the contract at the time it was rejected.

When the pathology contract was rejected pursuant to Section 116(1), Dr. Bratrud became a creditor of the debtor hospital as provided in Section 202, and was entitled to recover in the Chapter X proceeding any damages he suffered as a result of such rejection. Dr. Bratrud has maintained throughout these proceedings that the purpose of his action was, and is, to recover damages as a Section 202 creditor. The referee, applying traditional contract principles, found that the appellee had suffered no damages as a result of the rejection of the pathology contract because he had no right or interest in the contract at the time it was rejected. We agree.

The district court misconstrued the nature of appellee's action. The sole question certified to the district court on review was whether the assignment from Dr. Bratrud to Dr. Davidson was voluntary. After reviewing the activities of Receiver Foster with regard to appellee, the court concluded that the assignment was involuntary and the result of economic coercion by the receivers, and that the "cause of action arose when the contract was breached [by the receivers] and [Dr. Bratrud] was prevented from fulfilling his part of the agreement." As a matter of law, however, the cause of action under Section 202 arose on August 11, 1964, when the trustee was authorized to reject the contract. That statement by the district court is, in effect, a finding against Receiver Foster for tortious interference with the contractual arrangements between Dr. Bratrud and the hospital. Any damages to appellee which may have resulted from such conduct cannot properly be considered within the context of proceedings for damages resulting from the approved rejection of the contract. The district court improperly turned a hearing on a claim for damages for judicial rejection of the contract into a judgment against the trustee by reason by tortious conduct of the receiver.

The question of what motivated Dr. Bratrud to assign his contract is irrelevant for the purpose of determining damages for an authorized rejection. No section of the Bankruptcy Act has been cited to this court which provides that an involuntary transfer may be disregarded in a proceeding for damages for a Section 116(1) contract rejection. Such a rule could lead to the inequitable situation where two claimants seek damages for rejection of a contract by a trustee to result in damages for assigned sequentially and for valuable consideration between them.

Although bankruptcy proceedings are equitable in nature, *Pepper v. Litton*, 308 U.S. 295, 304 (1939); *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934), equity cannot be stretched to the point of permitting a proceeding for damages caused by the rejection of a contract by a trustee to result in damages for alleged tortious conduct while the contract was in effect.

The judgment is reversed and the cause is remanded to the district court with directions to issue its judgment affirming the order of the referee.

Appendix XIII

(R448-464)

In the United States District Court

For the District of Arizona

Filed May 25 1966
By D. J. Kennedy

Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor

Theodor E. Bratrud,
Petitioner
vs.

Frank J. Dunning, as Trustee of the estate of said Debtor,
Respondent

PETITION BY THEODOR E. BRATRUD FOR ORDER TO SHOW CAUSE WHY TRUSTEE SHOULD NOT PAY DAMAGES FOR TERMINATION OF EXECUTORY AGREEMENT

To the Honorable Carl A. Meucke, United States District Judge:

The petition of Theodor E. Bratrud respectfully represents:

1. That he is a creditor in the aforesaid Chapter X proceedings by virtue of the rejection and termination of his executory contract with the Maryvale Community Hospital for laboratory services, a copy of which is attached hereto as Exhibit "A", said contract having been executed on or about October 25, 1962, under which the petitioner, as a Pathologist, agreed to conduct the Department of

Pathology and provide services and supervision to meet the needs of the debtor hospital for a period of five years; that the validity of said agreement has heretofore been determined by this court by the Hon. Roger D. Foley on May 7, 1964, a copy of the Findings of Fact and Conclusions of Law being attached hereto as Exhibit "B", wherein the court specifically held that said agreement was, and at all times pertinent thereto, a "valid and subsisting Agreement".

2. That on or about May 11, 1964, the Hon. Roger D. Foley, Jr. entered an order approving creditors' petition for reorganization and an order of referral to the Hon. Russell B. Taylor as Special Master, upon which a formal order of referral was entered on July 23, 1964.

3. That on or about July 30, 1964, Frank J. Dunning, as Trustee, petitioned (Doc. #88) this court to reject the executory agreement with Dr. Theodor E. Bratrud pursuant to Section 116, Subsection 1, of Article III, Chapter X, of the Act of Congress relating to Bankruptcy; that thereafter Roger D. Foley (Jr.), United States District Judge, entered an order to show cause authorizing the rejection of said contract and permitting respondent, Theodor E. Bratrud, to present to this court a claim for injuries which may have resulted from the rejection of said executory contract and authorizing the determination of damages; that said agreement was terminated on August 3, 1964 (Doc. #128); that subsequent thereto the matter having been referred to Russell B. Taylor as Special Master and Referee in Bankruptcy, and the matter of the objections by Dr. Theodor E. Bratrud to the accounting of Fred Foster, the Chapter X Receiver, said Referee determined that in compliance with said agreement, prior to the *rejection*, Dr. Theodor E. Bratrud was entitled to the sum of $30,543.60, and on February 9, 1965, (Doc. #129) an order was entered directing said Trustee to pay said funds

pursuant to the Findings of Fact and Conclusions of Law (Doc. #128) heretofore filed on January 28, 1965; that under the Findings of Fact and Conclusions of Law, the Referee in Bankruptcy ordered that "the Court expressly reserves jurisdiction to hear and determine the injury and damages sustained or incurred by Theodor E. Bratrud by reason thereof" for said breach of contract.

4. That the contract of October 25, 1963, between Maryvale Community Hospital, Inc. and Dr. Theodor E. Bratrud, a copy of which is attached hereto as Exhibit "A", provided for damages for the termination thereof as follows:

> "If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on overage monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist."

5. That it appears from the records in these proceedings that the bondholders herein are the only other creditors affected by these proceedings and that a 2% dividend was paid to the bondholders on or about July 20, 1965, and subsequently a 3% dividend or interest payment was paid on or about November 18, 1965, at which time the Trustee, Frank J. Dunning, alleged:

> "(b) That these bondholders represent the only unsatisfied creditors and that there are no prior creditors; that the only amounts owed by the hospital are by way of monthly accounts and all such accounts are paid to date."

6. That on or about March 21, 1966, the Trustee filed his Twenty-First monthly report as Trustee showing on Schedule "A" total assets of $3,324,532.44, including cash in bank of $103,634.43 and accounts receivable totaling $344,169.88; that it therefore appears that upon liquidation and proof of the petitioner's damages for termination of the executory contract that there are sufficient assets in the estate to satisfy his claim as a creditor herein, the court having been previously advised on July 6, 1964, by the Trustee, Roland Wilpitz, (Doc. #66) wherein the Trustee's report and list of creditors by classification indicated "no unsecured creditors".

7. That pursuant to the provisions of the Bankruptcy Act relating to termination of executory contracts and damages therefor, the petitioner is entitled to a hearing upon the matter of said damages in accordance with the Findings of Fact and Conclusions of Law of the Referee and Special Master, wherein the Hon. Russell B. Taylor on or about January 27, 1965, "expressly reserves jurisdiction to hear and determine the injuries and damages incurred by Theodor E. Bratrud by reason thereof".

8. That in accordance with the aforesaid pathologist agreement, the Trustee is bound to make up the financial loss to the petitioner for that period of time when he would normally be in practice, such period of time not to exceed six months and to be established as that time between which the termination of the pathologist was effected, that is, August 3, 1964, and at such time as the petitioner pathologist is able to secure new employment in his field, the amount of damages as spelled out in said contract to be fixed by the financial loss based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist; that in order to simplify the hearing on said matter, your peti-

tioner has secured an accounting of the net funds due the laboratory from the hospital during its operation beginning in November, 1962, through April, 1964, a copy of the letter of Sheppard & Johnson, Certified Public Accountants, and the accounting due the laboratory for said period being attached hereto as Exhibit "C".

9. That your petitioner has been unable to secure new employment in his field because of the termination of the aforesaid agreement and that he has suffered substantial losses averaging in excess of $15,000.00 per month for a period greater than the six months period mentioned in said contract; that your petitioner has attempted to mitigate his damages by selling, assigning and transferring his interest under economic compulsion to Judson A. Davidson, M.D., the pathologist in operation of the present Pathology Department at Maryvale Hospital and that said transfer, assignment and sale was caused by the illegal restraining orders entered in October, 1963, and subsequently on February 18, 1964, and the lengthy litigation which has ensued and is a record herein.

Wherefore, your petitioner prays that this court enter its order requiring the Trustee, Frank J. Dunning, to appear and show cause, if any he has, on a day certain, why the petitioner's damages should not be fixed and paid out of the assets of the estate as a creditor herein by virtue of the rejection and termination of the executory contract for laboratory services upon the submission of proofs herein.

HERBERT MALLAMO AND
ROBERT G. MOOREMAN

By /s/ ?????
Attorneys for Theodor E.
Bratrud, Petitioner

State of Arizona
County of Maricopa—ss.

Theodor E. Bratrud, being first duly sworn upon oath, deposes and says:

That he is petitioner herein; that the allegations contained in the foregoing petition are true and correct to the best of his knowledge, information and belief.

/s/ THEODOR E. BRATRUD
Theodor E. Bratrud

Subscribed and sworn to before me this 29 day of April, 1966.

MARY B. DOOLEY
Notary Public

My Commission Expires:
Dec. 5, 1968

EXHIBIT "A"

AGREEMENT

This Agreement made and entered into this 25 day of October, 1962 by and between Maryvale Community Hospital, Inc., an Arizona non-profit corporation, hereinafter designated as Hospital and Theodor E. Bratrud, hereinafter designated as Pathologist.

WITNESSETH:

Whereas, the hospital is desirous of establishing and maintaining a department of pathology and in connection therewith to maintain standards in the practice of pathology which will meet with the requirements of approval by the Joint Commission of Accreditation of Hospitals, the American Society of Clinical Pathologists and the College of American Pathology and

Whereas, the pathologist will be a physician duly licensed to practice medicine in the State of Arizona and a recognized specialist in pathology eligible for certification by the American Board of Pathology in pathologic anatomy and/or clinical pathology.

Whereas, both parties recognize that the practice of medicine is legally a franchise granted by the State to an individual after rigid technical training and due examination, and it is the desire of both parties that the professional services of the pathologist be made available to the patients in the hospital and to the professional staff of the hospital.

I. THE HOSPITAL COVENANTS AND AGREES AS FOLLOWS:

1. To make adequate provisions for proper and adequate space for the pathology department including but not limited to operating space for technologic and personnel, storage space for supplies and pathological specimens,

laboratory space, and quarters for the housing and maintenance of animals as may be required for clinical diagnostic and expermental procedures and to equip such space with the necessary basic equipment and facilities to maintain such department.

2. To act as the billing, accounting and collecting agent for the pathologist for all in-patient and emergency room hospital pathology services and to maintain such books and records as are necessary to provide this service, said books and records to be made available for inspection and copying by the pathologist or his staff at such time and place as shall be mutually convenient to hospital and pathologist or his staff.

3. To provide lighting, heating, janitor service, telephone service and all basic utilities to the space provided for the pathology services.

4. The hospital will remit on the 1st and 15th of each month for the semi-monthly period just prior to each date to the pathologist 80% of all in-patient and emergency room hospital billings for laboratory services, the pathologist or his staff to run and maintain the department of pathology and laboratory as he sees fit, subject to the provisions of this agreement. The pathologist will be reimbursed based upon his records of in-patient services. Such records may be examined by the hospital periodically.

II. PATHOLOGIST CONVENANTS AND AGREES AS FOLLOWS:

1. To assume the responsibility for the conduct of the department of pathology and to devote such time as is necessary to provide proper and adequate service and supervision which will meet the needs of the patients and/or the medical staff.

2. To be responsible for matters of general policy, rules, regulations, professional and technical procedures, and the

development of clinical or other research projects within the department of pathology.

3. To be responsible for the prompt performance of all laboratory examinations requested, the preparation of written reports and the retention of such materials as microscopic sections; to keep accurate and complete records, including a proper filing system.

4. To be responsible for the performance of duly authorized autopsies on hospital patients properly admitted, whose deaths are legally regarded as hospital deaths, and to make available promptly for the hospital record, the attending physician and the departmental files, reports including both gross and microscopic findings, and to preserve pertinent tissues, blocks and sections in conformity with established customs and laws at no charge to the hospital.

5. To engage such physicians and technicians and other personnel as are required for the proper functioning of the department and to be responsible for the purchase of all supplies and equipment necessary for the conduct and improvement of the pathology service.

6. To provide, without charge, such pathology services as may be required for the care of bona fide charity patients of the hospital and also that which is necessary to protect patients and personnel from communicable diseases within the hospital.

7. To provide for consultations at operations and for frozen section diagnosis and for consultation with staff physicians.

III. THE PARTIES MUTUALLY COVENANT AND AGREE AS FOLLOWS:

1. For and in consideration of the services to be rendered and the covenants to be performed by the hospital, pursuant to Section I of this agreement, the pathologist or his staff agree to reimburse the hospital 20% of the gross

billings for the laboratory as and for payment of rent, lights, heat, in-patient bookkeeping and accounting, telephone service and janitor service, and basic utilities. The books and records of the hospital insofar as they relate to the income or fees produced by or earned from the laboratory or the pathologist and his staff shall be subject to the inspection and audit of the pathologist and his staff as above mentioned in Paragraph I Section 2. In the event there is any dispute between the parties hereto concerning the amount of income due and payable to either party hereunder, findings and report of a certified public accountant mutually acceptable to both parties shall be conclusive in such determination.

2. The pathologist or his staff may provide services to patients, citizens and institutions outside the hospital and any remuneration therefore shall belong entirely to the pathologist and his staff, provided, however, that such other professional activities must not interfere with services to the hospital staff and patients as designated herein.

3. The pathologist shall be known and designated as Chief of the Pathology Department and shall have status equivalent to that of any other Chief of Services within the hospital and shall be a member of the medical executive committee the same as other department heads with the pathology services to be a division of the hospital staff equal in all respects to other divisions of the hospital.

4. The pathologist shall be an independent contractor and maintain and operate the department of pathology and the laboratory exclusively under his supervision with the right to make such rules and regulations, to hire and fire personnel necessary for the operation of the laboratory and to decide all matters of policy pertaining to the department of pathology insofar as these provisions do not directly conflict with any hospital laws, by-laws, provisions or policies.

5. The pathologist or his staff shall provide for continuing professional service.

6. This agreement shall be applicable and continued in force with any associates or assigns of the pathologist and shall be binding upon the successors and assigns of the hospital.

7. This agreement shall be for a term of five (5) years from this date and shall be deemed to be automatically renewed unless terminated in writing by either party at least 180 days prior to the renewal date.

8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist.

9. Any of the matters contained in this agreement may be altered from time to time by the written consent of the parties to this agreement without in any way effecting the remainder of this agreement.

10. This agreement shall supercede, and replace any and all previous agreements entered into by and between THEODOR E. BRATRUD and the hospital.

In Witness Whereof the parties have caused this agreement to be executed at Phoenix on the 25th day of October, 1962.

MARYVALE COMMUNITY HOSPITAL
By /s/ ? ? ? ? ? ?
President

ATTEST:
/s/ ? ? ? ? ? ? ?
Secretary

By /s/ T. E. BRATRUD, M.D.
T. E. Bratrud, M.D.

EXHIBIT "B"

In The United States District Court
For the District of Arizona

No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc.,
Debtor.

vs.

Theodore E. Bratrud,
Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regulariy for trial on the 9th and 26th days of March, 1964, upon the petition of Fred Foster, Receiver herein, for Temporary Restraining Order and Order to Show Cause against Theodor E. Bratrud and said Respondent's response thereto; Petitioner appearing by his attorney, Donald D. Meyers, Shimmel, Hill, Kleindienst & Bishop, attorneys at law, Phoenix, Arizona, and Respondent appearing by his attorney, Herbert Mallamo, Phoenix, Arizona; the parties having introduced evidence both oral and documentary, and the Court having considered the same, finds the facts and states conclusions of law as follows:

FINDINGS OF FACT

I.

That on or about the 25th day of October, 1962, Maryvale Community Hospital, Inc., an Arizona corporation, and Theodor E. Bratrud, Respondent, made and entered into a certain Agreement in writing, wherein and whereby said Respondent was designated and employed as pathologist for said "Hospital" for a term of five years from said date.

II.

An Order was made and entered on October 28, 1963, in that certain action entitled "Union Title Company, et al. v. Maryvale Community Hospital, Inc.", then pending in the Superior Court of the State of Arizona, in and for the County of Maricopa, being Cause No. 151970 therein, purporting to terminate the aforesaid Agreement and the employment of Respondent, Theodor E. Bratrud, as such pathologist.

III.

That said Agreement of October 25, 1962, between Maryvale Community Hospital, Inc. and Respondent, Theodor E. Bratrud, at all times herein has been, and is now a valid and subsisting Agreement, and that the terms thereof are binding upon Fred Foster, Receiver herein.

IV.

That the Order to Show Cause issued against Respondent, Theodor E. Bratrud for temporary restraining order should be quashed and said temporary restraining order vacated, and that the Petition for Preliminary Injunction against said Respondent should be denied.

CONCLUSIONS OF LAW

I.

That the Agreement of October 25, 1962, by and between the Maryvale Community Hospital, Inc. and Respondent, Theodor E. Bratrud, at all times herein was and is a valid and subsisting Agreement; and that the same is binding upon Fred Foster, Receiver herein.

II.

That the Order to Show Cause issued against Respondent, Theodor E. Bratrud, is quashed; that the temporary restraining order issued against said Respondent is va-

cated; that the Petition for Preliminary Injunction against Respondent, Theodor E. Bratrud, is denied.

DATED: May 7th, 1964.

/s/ ROGER D. FOLEY
Roger D. Foley
United States District Judge

EXHIBIT "C"

Sheppard & Johnson [Letterhead]
Certified Public Accountants

April 6, 1966

Mr. Robert Mooreman
729 First National Bank Bldg.
Phoenix, Arizona

Dear Mr. Mooreman:

Dr. T. E. Bratrud has asked us to furnish you with certain information concerning receipts of the Maryvale Medical Center Laboratory from the Maryvale Hospital for the period that he operated the hospital from November 1, 1962 through April 30, 1964.

The attached schedule should provide you with the information requested. If we can be of any further assistance, please call us.

Very truly yours,
/s/ Fred G. Johnson, Jr.

vg
Enclosure

MARYVALE MEDICAL CENTER LABORATORY INPATIENT INCOME FROM MARYVALE HOSPITAL

From November 1, 1962 to April 30, 1964

		Amount Due Laboratory from Hospital	6 Month Average
1962	November	14,101.05	
	December	12,630.22	
1963	January	16,748.32	
	February	17,907.83	
	March	19,442.98	
	April	17,821.80	16,442
	May	16,010.80	16,760
	June	15,678.29	17,268
	July	16,209.84	17,179
	August	13,386.41	16,425
	September	13,253.82	15,393
	October	13,822.16	14,727
	November	11,735.66	14,014
	December	15,887.22	14,049
1964	January	16,420.07	14,084
	February	14,164.70	14,214
	March	18,823.73	15,142
	April	16,343.68	15,562

Amounts from August 1963 through April 1964 were taken from the Hospital Statement on which court settlement was made.

Amounts for prior months were taken from Settlement sheets in our files which we believe are accurate. They do not agree with the amounts recorded on the books by months because the books were on a cash basis and there was always a lag of half a month.

We have not reconciled these figures to the book figures nor do we think it can be done on the basis of information presently available.

Appendix XIV

(R 493-494)

Filed Nov 15 1966
Wm. H. Loveless, Clerk
United States District Court
For the District of Arizona
By Frances Daudnt
Deputy Clerk

In the United States District Court
for the District of Arizona

Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor.

Theodore E. Bratrud,
Petitioner,

vs.

Frank J. Dunning, as Trustee of the Estate of said Debtor,
Respondent.

ORDER TO SHOW CAUSE

Upon presentation of the petition of Theodor E. Bratrud, and pursuant to the order of special reference, the court being duly advised in the premises, and good cause having been shown therefor, it is hereby

Ordered, that Frank J. Dunning, as Trustee of the estate of the debtor herein, appear before this court, in Courtroom No. 5, U. S. Courthouse, in the City of Phoenix, County of Maricopa, State of Arizona, on Wednesday, the 29th day of June, 1966, at the hour of 10:00 o'clock A.M., or as soon thereafter as counsel may be heard, to show cause why petitioner's damages should not be fixed and paid out of the

assets of the estate as a creditor herein by virtue of the rejection and termination of the executory contract for laboratory services upon the submission of proofs herein, and it is further

Ordered, that service of a copy of the petition and this order may be made by first class United States mail to all interested parties.

Done in Open Court this 8 day of June, 1966.

/s/ Russell B. Taylor
Russell B. Taylor, Referee in Bankruptcy

Appendix XV

(R 512-513)

Filed Nov. 15 1966
Wm. A. Loveless, Clerk
United States District Court
For the District of Arizona
By Frances Daudnt
Deputy Clerk

In the United States District Court
for the District of Arizona

Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor.

Theodore E. Bratrud,
Petitioner,

vs.

Frank J. Dunning, as Trustee of the Estate of said Debtor,
Respondent.

MOTION TO QUASH ORDER TO SHOW CAUSE

Comes now, Frank J. Dunning, Trustee in the above matter and respondent pursuant to an order to show cause issued by this Court on June 8, 1966, and moves the Court to quash said order upon the following grounds:

1. As the record in this proceeding shows, the principal creditors are the bondholders of Maryvale Community Hospital and as such are secured creditors. Sections 196 and 197 of Chapter X of the Bankruptcy Act provide:

> "Sec. 196. After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Ob-

jections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court.

Sec. 197. For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock. For the purposes of such classification, the judge shall, if necessary, upon the application of the trustee, the debtor, any creditor, or an indenture trustee, fix a hearing upon notice to the holders of secured claims, the debtor, the trustee, and such other persons as the judge may designate, to determine summarily the value of the security and classify as unsecured the amount in excess of such value."

Thus far the Judge has not prescribed the manner in which and fixed a time within which proofs of claims of creditors and of the interests of stockholders may be filed and allowed. Accordingly, this petition in which petitioner, an unsecured creditor at best, seeks a priority over the secured creditors, is not timely.

2. Upon information and belief that the alleged contract of October 25, 1962, was assigned by petitioner prior to the time for which petitioner seeks compensation and therefore has no rights under it.

Respectfully submitted.

/s/ Frank J. Dunning, Trustee
By John F. Sullivan
John F. Sullivan
Attorneys for Respondent
403 Luhrs Building
Phoenix, Arizona

Received copy this 29 day of June, 1966.
/s/ Frank G. Mahoney
Attorney for Petitioner

Appendix XVI

(R 766-768)

Filed Sep. 26 1968
Wm. H. Loveless, Clerk
United States District Court
For the District of Arizona
By M. Larson
Deputy Clerk

United States District Court
District of Arizona

Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor.

Theodor E. Bratrud,
Petitioner,
vs.
Frank J. Dunning, as Trustee of the Estate of said Debtor,
Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for hearing on the 29th day of June, 1966, before the Honorable Russell B. Taylor, Special Master and Referee, upon the petition of Theodor E. Bratrud for Order to Show Cause why Trustee should not pay damages for termination of executory agreement and the subsequent order entered on June 8, 1966; the petitioner appearing in person and by his counsel, Robert G. Mooreman; the Trustee appearing in person and by his counsel, John F. Sullivan; and Maryvale Community Hospital Bondholders' Committee appearing by its counsel, John G. Brennan; the trustee having filed his motion to quash

order to show cause, and the parties having introduced evidence both oral and documentary, and the Court, having considered the same, finds the facts and states conclusions of law as follows:

FINDINGS OF FACT

1. That on or about October 26, 1962, Maryvale Community Hospital, Inc., an Arizona corporation, and Theodor E. Bratrud made and entered into a certain agreement in writing, wherein and whereby said respondent, Theodor E. Bratrud, was designated and employed as pathologist for said hospital for a term of five years from said date.

2. That said agreement required, and the said Theodor E. Bratrud furnished, professional services under and in accordance with said agreement for the period August 1, 1963, to and including the 30th day of April, 1964.

3. That said agreement in writing dated October 25, 1962, inter alia, on page 5 paragraph 8, provided:

> "8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist."

4. That on April 28, 1964, Theodor E. Bratrud voluntarily assigned all of his right, title and interest in and to the said agreement of October 25, 1962, to Dr. Judson A. Davison, Pathologist, and thereafter negotiations for a new

pathological contract were entered into between Maryvale Community Hospital, Inc., and Dr. Davison.

5. That on July 22, 1964, the Trustee petitioned this Court to reject said agreement of October 25, 1962, and on August 11, 1964, this Court entered its order that trustee reject the alleged agreement between petitioner and said hospital.

6. That on April 30, 1965, petitioner wrote respondent advising him that the said contract for laboratory services was terminated by mutual agreement.

7. That neither respondent nor the debtor corporation terminated the aforesaid agreement of October 25, 1962, prior to its total assignment to Dr. Judson A. Davison on April 28, 1964.

8. That the order to show cause herein issued against respondent should be quashed and the petition of petitioner, Theodor E. Bratrud, be denied.

CONCLUSIONS OF LAW

1. That the debtor corporation and petitioner, Theodor E. Bratrud, entered into an agreement dated October 25, 1962, wherein petitioner was designated and employed as pathologist for said hospital.

2. That petitioner voluntarily assigned said agreement to Dr. Judson A. Davison on April 28, 1964, which assignment became effective May 1, 1964.

3. That as of August 11, 1964, the date of its termination, the petitioner had no right, title or interest in and to said agreement of October 25, 1962, and could not have been and was not damaged by its termination.

4. That the order to show cause heretofore issued on June 8, 1966, against the respondent, Frank J. Dunning as Trustee of Maryvale Community Hospital, Inc., an Arizona

corporation, debtor, is hereby quashed and the petition of Theodor E. Bratrud is hereby denied.

Dated this 18th day of September, 1968.

/s/ RUSSELL B. TAYLOR
Russell B. Taylor, Referee in Bankruptcy

Appendix XVI(b)

(R 769)

United States District Court
District of Nevada

Bankruptcy No. B-9352-Phx.

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor.

Theodor E. Bratrud,
Petitioner.

—vs—

Frank J. Dunning, as Trustee of the estate of said Debtor,
Respondent.

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law, contemporaneously filed with this Order, the Court does hereby

Order and Decree that the order to show cause in this proceeding heretofore entered on June 8, 1966, be, and the same is hereby, quashed.

It is Further Ordered that the petition by Theodor E. Bratrud for order to show cause why trustee should not pay damages for termination of executory agreement be, and the same is hereby, dismissed.

Dated this 18th day of September, 1968, at Las Vegas, Nevada.

/s/ Russell B. Taylor
Russell B. Taylor
Referee in Bankruptcy

Appendix XVII

(R 1188-1189)

Filed Nov 19 1969

W. J. Furstenau Clerk
United States District Court
for the District of Arizona

By .....
Deputy Clerk

Robert G. Mooreman
832 First National Bank Bldg.
Phoenix, Arizona 85004
252-8744

Herbert Mallamo
216 Luhrs Building
Phoenix, Arizona 85003
252-3611

Attorneys for Theodore E. Bratrud

In the United States District Court
For the District of Arizona

No. B-9352-Phx.—CAM

In the Matter of
Maryvale Community Hospital, Inc., an Arizona corporation,
Debtor

Theodore E. Bratrud,
Petitioner

vs.

Frank J. Dunning, as Trustee of the Estate of said Debtor,
Respondent

AMENDED JUDGMENT AGAINST FRANK J. DUNNING, AS TRUSTEE OF THE ESTATE OF SAID DEBTOR

This cause having come on to be heard as a Petition for Review concerning the claim of Dr. Theodore E. Bratrud and submitted for decision upon the evidence of record

and memorandum of counsel, and the Court being fully advised in the premises and upon consideration thereof, it is

Ordered, Adjudged and Decreed as follows:

That the petitioner, Theodore E. Bratrud, recover of and against Frank J. Dunning, as Trustee of the Estate of the Debtor herein, the sum of Ninety Thousand Dollars ($90,000.00) as liquidated damages for the breach of the Bratrud contract with Maryvale Community Hospital, Inc., with interest at the rate of six percent (6%) per annum from August 1, 1963, the date of the original involuntary petition for reorganization of the Debtor Corporation under the Chapter X proceedings filed herein, and petitioner's costs of action in the amount of $341.60, all pursuant to the Opinion and Order of this Court dated August 18, 1969.

It Is Further Ordered vacating and setting aside the judgment of the Hon. Russell B. Taylor, Referee in Bankruptcy, dated April 18, 1968, at Las Vegas, Nevada.

Dated this 19th day of November, 1969.

/s/ C. A. MUECKE
C. A. Muecke, United States
District Judge

Received copy this ..... day of Nov. 1966
JOHN F. SULLIVAN
John F. Sullivan
Robert G. Mooreman and
Herbert Mallamo
By !!!!!

Appendix XVIII

(R1041-1056)

Filed Aug. 19, 1969
Wm. H. Loveless, Clerk
United States District Court
for the District of Arizona

In the United States District Court
for the District of Arizona

No. B-9352 PHX-CAM

In the Matter of
Maryvale Community Hospital, Inc.,
an Arizona Corporation,
Debtor.

Theodor E. Bratrud,
Petitioner,

vs.

Frank J. Dunning, as Trustee of the
Estate of said Debtor,
Respondent.

OPINION AND ORDER

It Is Hereby Ordered that the Findings of Fact and Conclusions of Law[1] entered by Russell B. Taylor, Referee in Bankruptcy on September 26, 1968 in the above captioned cause are modified in the following ways:

1. Findings of Fact Nos. two, four, seven, and eight are rejected.

2. Conclusions of Law Nos. two, three, and four are rejected.

1. See Appendix A for the full text of the Referee's Findings of Fact and Conclusions of Law.

In passing on a petition for review of an order entered by a referee, the district judge sits "in effect" as an appellate court reviewing the findings of the referee. *In re Sussman* (D.C.N.Y., 1950) 88 F. Supp. 230; General Order 47 of the General Orders in Bankruptcy; and Rule 53(e) (II) of the Federal Rules of Civil Procedure provide that the findings of fact of a referee or special master shall be accepted "unless clearly erroneous." See also, *Matter of Roark* (D.C. Ky. 1939) 28 F.Supp. 515. These provisions are applicable to Chapter X in a corporate reorganization proceeding (General Orders 37 and 52 of the General Orders in Bankruptcy) and apply to a referee's order, as distinguished from a special master's report. *In re Byrd Coal Co.* (2nd Cir. 1936) 83 F.2d 190.

The petitioner, Dr. Theodor E. Bratrud, and the debtor, Maryvale Community Hospital, Inc., entered into a written contract on or about October 25, 1962, whereby Dr. Bratrud was designated and employed (as an independent contractor) as Pathologist for the Hospital for a period of five years, commencing from the date of the written contract.[2] The contract was found to be "a valid and subsisting agreement; and that the same is binding upon Fred Foster, Receiver herein," by Judge Foley in his Findings of Fact and Conclusions of Law, entered May 7, 1964.

Mr. Fred Foster was appointed Co-Receiver of the Hospital in a state court proceedings on August 1, 1963 and Co-Trustee in the Chapter X proceedings in the Federal Court on November 26, 1963. Up until Mr. Foster's initial appointment, there had been no apparent turmoil between Dr. Bratrud and the Hospital.

After being appointed Co-Receiver, Mr. Foster decided the agreement between Dr. Bratrud and the Hospital was not in the interests of the Hospital. Ex. D: Foster—p. 14 When Foster could not re-negotiate Dr. Bratrud's agree-

2. The contract is set out in its entirety in Appendix B.

ment, Mr. Foster regarded his contract as being terminated.

Ex. D: Foster—pp. 15-16
Lahr — p. 95
Meyers—pp 140-141

Mr. Foster then took steps to enforce his determination that the agreement of October 25, 1962 was terminated, even before the Court terminated the contract on August 11, 1964, pursuant to Section 116, subsection 1, of Article III, of Chapter X of the Bankruptcy Act.

In September of 1963, Mr. Foster attended an executive meeting of the medical staff at which time he called for a vote of confidence on Dr. Bratrud and a majority of those present voted "no".

Ex. D: Foster—pp. 16-17.

Ex. A: Attached to Petition of Receiver for Temporary Restraining Order and Order to Show Cause filed February 24. 1964.

The testimony of Dr. Bratrud to the effect that he was never notified of the staff meeting or given an opportunity to appear to make a statement and knew nothing about it until the Hospital Administrator sent a letter advising Dr. Bratrud that his staff privileges had been revoked, has not been refuted.

Ex. E: Bratrud—pp. 142-144
Foster—pp. 39-52
Foster—p. 44
Lahr—pp. 87-88.

Other steps taken by Mr. Foster and his administrator, Mr. Powell, included

(1) placing Dr. Davidson in charge of the Pathology Laboratory

Ex. D: Foster—pp. 22 and 58

(2) transfer of Dr. Bratrud's employees to the hospital payroll

Ex. D: Foster—p. 24

(3) collecting the money for laboratory services rendered but disregarding the contract by paying Dr. Bratrud only $3000 every two weeks from which Dr. Bratrud was to pay all his expenses, including bi-weekly wages of $3000 for his employees

Ex. D: Foster—pp. 47, 49-51, and 56

Ex. F: Foster—p. 70

(4) assumed all expenses of the laboratory

Ex. D: Kolmus—pp. 122 and 126-128

(5) changing the locks on the laboratory

Tr., Vol. II, June 29-30, p. 54-55

Tr., Vol. I, June 29, pp. 123-126

Ex. D: Foster—p. 23

(6) confiscating the laboratory mail

Tr., Vol. I, June 29-30, p. 55

Tr., Vol. I, June 29, pp. 123-126.

It is thus apparent to this Court that Dr. Bratrud's contract was breached when the Co-Receiver, Mr. Foster, refused to abide by its terms and prevented the Doctor from abiding by its terms. Dr. Bratrud's cause of action arose when the contract was breached and he was prevented from fulfilling his part of the agreement.

Dr. Bratrud has effectively been evicted from the Hospital and denied his only source of monthly income by the improper withholding of the monies due him under the Pathology Laboratory contract. As a consequence of the Co-Receiver's actions, Dr. Bratrud was faced with a tax lien, default on various equipment contracts, default on accounts payable to his suppliers, and the likelihood of personal bankruptcy and financial ruin. Therefore, acting under the compulsion of these circumstances, Dr. Bratrud was forced to assign his contract to Dr. Davidson. Dr. Davidson was the person previously selected by the co-

receivers to run the Pathology Laboratory for them and who had in fact, been operating the Laboratory under an agreement with the co-receivers since the one-sided termination of Dr. Bratrud's contract. This assignment to Dr. Davidson apparently was the end result desired by the co-receivers.

Counsel for the Trustee cites us to *Fruhauf Southwest Garment Co. v. United States* (Ct. of Cl., 1953) 11 F.Supp. 945, for the elements necessary for economic duress:

"(1) that one side involuntarily accepted the terms of another;

"(2) that the circumstances permitted no other alternative; and

"(3) that said circumstances were the result of coercive acts of the opposite party." Supra at p. 951. Although "mere stress of business conditions does not constitute duress where the defendant was not responsible for such circumstances," (*Lawrence v. Muter Co.* (7th Cir. 1949) 171 F.2d 380), it is apparent in the case before that the laboratory had a lucrative business grossing approximately $157,563 for the eight month period from August 1, 1963 to March 31, 1964.

Ex. F: Foster—p. 74.

Therefore, the duress was not caused by business stress but rather by the coercive tactics of the Co-Trustee. Dr. Bratrud had no alternative but to make the assignment to Dr. Davidson, who had already entered an agreement to operate the Laboratory. As for the element of voluntariness, when one has been evicted from his place of business; had his moneys, mails, and staff confiscated; and had his entire business virtually seized and turned over to another —it cannot be said there is voluntariness and no duress.

Based upon the foregoing discussion, this Court finds and concludes that the co-receivers breached the contract

dated October 25, 1962 between Dr. Bratrud and Maryvale Community Hospital, Inc. and that the assignment of said contract by Dr. Bratrud to Dr. Davidson was involuntary and the result of economic duress exerted by the co-receivers. This Court also finds and concludes that under the terms of said contract (Part III, paragraph 8), the hospital is bound to pay damages to Dr. Bratrud in an amount equal to six times the "average monthly reimbursement by the Hospital to the pathologist during the year preceding the termination of the pathologist" which monthly average was $15,000. Tr., April 19, 1968, p. 27.

It is hereby Ordered that the petitioner submit to the Court, a form of judgment in accordance with this opinion.

Dated this 18th day of August, 1969.

/s/ C. A. MUECKE
C. A. Muecke

United States District Judge

Appendix A

United States District Court
District of Arizona

Bankruptcy No. B-9352-Phx.

In the Matter of
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona Corporation,
Debtor.

THEODOR E. BRATRUD,
Petitioner,

vs.

FRANK J. DUNNING, as Trustee of the estate of said Debtor,
Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for hearing on the 29th day of June, 1966, before the Honorable Russell B. Taylor, Special Master and Referee, upon the petition of Theodor E. Bratrud for Order to Show Cause why Trustee should not pay damages for termination of executory agreement and the subsequent order entered on June 8, 1966; the petitioner appearing in person and by his counsel, Robert G. Mooreman; the Trustee appearing in person and by his counsel, John F. Sullivan; and Maryvale Community Hospital Bondholders' Committee appearing by its counsel, John G. Brennan; the trustee having filed his motion to quash order to show cause, and the parties having introduced evidence both oral and documentary, and the Court, having considered the same, finds the facts and states conclusions of law as follows:

FINDINGS OF FACT

1. That on or about October 26, 1962, Maryvale Community Hospital, Inc., an Arizona corporation and Theodor E. Bratrud made and entered into a certain agreement in writing, wherein and whereby said respondent, Theodor E. Bratrud, was designated and employed as pathologist for said hospital for a term of five years from said date.

2. That said agreement required, and the said Theodor E. Bratrud furnished, professional services under and in accordance with said agreement for the period August 1, 1963, to and including the 30th day of April, 1964.

3. That said agreement in writing dated October 25, 1962, inter alia, on page 5 paragraph 8, provided:

> "8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist."

4. That on April 28, 1964, Theodor E. Bratrud voluntarily assigned all of his right, title and interest in and to the said agreement of October 25, 1962, to Dr. Judson A. Davison, Pathologist, and thereafter negotiations for a new pathological contract were entered into between Maryvale Community Hospital, Inc., and Dr. Davison.

5. That on July 22, 1964, the Trustee petitioned this Court to reject said agreement of October 25, 1962, and on August 11, 1964, this Court entered its order that trustee

reject the alleged agreement between petitioner and said hospital.

6. That on April 30, 1965, petitioner wrote respondent advising him that the said contract for laboratory services was terminated by mutual agreement.

7. That neither respondent nor the debtor corporation terminated the aforesaid agreement of October 25, 1962, prior to its total assignment to Dr. Judson A. Davison on April 28, 1964.

8. That the order to show cause herein issued against respondent should be quashed and the petition of petitioner, Theodor E. Bratrud, be denied.

CONCLUSIONS OF LAW

1. That the debtor corporation and petitioner, Theodor E. Bratrud, entered into an agreement dated October 25, 1962, wherein petitioner was designated and employed as pathologist for said hospital.

2. That petitioner voluntarily assigned said agreement to Dr. Judson A. Davison on April 28, 1964, which assignment became effective May 1, 1964.

3. That as of August 11, 1964, the date of its termination, the petitioner had no right, title or interest in and to said agreement of October 25, 1962, and could not have been and was not damaged by its termination.

4. That the order to show cause heretofore issued on June 8, 1966, against the respondent, Frank J. Dunning as Trustee of Maryvale Community Hospital, Inc., an Arizona corporation, debtor, is hereby quashed and the petition of Theodor E. Bratrud is hereby denied.

Dated this 18th day of September, 1968.

/s/ Russell B. Taylor
Russell B. Taylor,
Referee in Bankruptcy

Appendix B

EXHIBIT "A"

AGREEMENT

This Agreement made and entered into this 25 day of October, 1962 by and between Maryvale Community Hospital, Inc., an Arizona non-profit corporation, hereinafter designated as Hospital and Theodor E. Bratrud, hereinafter designated as Pathologist.

WITNESSETH:

Whereas, the hospital is desirous of establishing and maintaining a department of pathology and in connection therewith to maintain standards in the practice of pathology which will meet with the requirements of approval by the Joint Commission of Acreditation of Hospitals, the American Society of Clinical Pathologists and the College of American Pathology and

Whereas, the pathologist will be a physician duly licensed to practice medicine in the State of Arizona and a recognized specialist in pathology eligible for certification by the American Board of Pathology in pathologic anatomy and/or clinical pathology.

Whereas, both parties recognize that the practice of medicine is legally a franchise granted by the State to an individual after rigid technical training and due examination, and it is the desire of both parties that the professional services of the pathologist be made available to the patients in the hospital and to the professional staff of the hospital.

I. THE HOSPITAL COVENANTS AND AGREES AS FOLLOWS:

1. To make adequate provisions for proper and adequate space for the pathology department including but not limited to operating space for technological and personnel, storage

space for supplies and pathological specimens, laboratory space, and quarters for the housing and maintenance of animals as may be required for clinical diagnostic and experimental procedures and to equip such space with the necessary basic equipment and facilities to maintain such department.

2. To act as the billing, accounting and collecting agent for the pathologist for all in-patient and emergency room hospital pathology services and to maintain such books and records as are necessary to provide this service, said books and records to be made available for inspection and copying by the pathologist or his staff at such time and place as shall be mutually convenient to hospital and pathologist or his staff.

3. To provide lighting, heating, janitor service, telephone service and all basic utilities to the space provided for the pathology services.

4. The hospital will remit on the 1st and 15th of each month for the semi-monthly period just prior to each date to the pathologist 80% of all in-patient and emergency room hospital billings for laboratory services, the pathologist or his staff to run and maintain the department of pathology and laboratory as he sees fit, subject to the provisions of this agreement. The pathologist will be reimbursed based upon his records of in-patient services. Such records may be examined by the hospital periodically.

II. PATHOLOGIST COVENANTS AND AGREES AS FOLLOWS:

1. To assume the responsibility for the conduct of the department of pathology and to devote such time as is necessary to provide proper and adequate service and supervision which will meet the needs of the patients and/or the medical staff.

2. To be responsible for matters of general policy, rules, regulations, professional and technical procedures, and the development of clinical or other research projects within the department of pathology.

3. To be responsible for the prompt performance of all laboratory examinations requested, the prepartion of written reports and the retention of such materials as microscopic sections; to keep accurate and complete records, including a proper filing system.

4. To be responsible for the performance of duly authorized autopsies on hospital patients properly admitted, whose deaths are legally regarded as hospital deaths, and to make available promptly for the hospital record, the attending physician and the departmental files, reports including both gross and microscopic findings, and to preserve pertinent tissues, blocks and sections in conformity with established customs and laws at no charge to the hospital.

5. To engage such physicians and technicians and other personnel as are required for the proper functioning of the department and to be responsible for the purchase of all supplies and equipment necessary for the conduct and improvement of the pathology service.

6. To provide, without charge, such pathology services as may be required for the care of bona fide charity patients of the hospital and also that which is necessary to protect patients and personnel from communicable diseases within the hospital.

7. To provide for consultations at operations and for frozen section diagnosis and for consultation with staff physicians.

III. THE PARTIES MUTUALLY COVENANT AND AGREE AS FOLLOWS:

1. For and in consideration of the services to be rendered and the covenants to be performed by the hospital, pursuant to Section I of this agreement, the pathologist or his staff agree to reimburse the hospital 20% of the gross billings for the laboratory as and for payment of rent, lights, heat, in-patient bookkeeping and accounting, telephone service and janitor service, and basic utilities. The books and records of the hospital insofar as they relate to the income or fees produced by or earned from the laboratory or the pathologist and his staff shall be subject to the inspection and audit of the pathologist and his staff as above mentioned in Paragraph I Section 2. In the event there is any dispute between the parties hereto concerning the amount of income due and payable to either party hereunder, findings and report of a certified public accountant mutually acceptable to both parties shall be conclusive in such determination.

2. The pathologist or his staff may provide services to patients, citizens and institutions outside the hospital and any remuneration therefore shall belong entirely to the pathologist and his staff, provided, however, that such other professional activities must not interfere with services to the hospital staff and patients as designated herein.

3. The pathologist shall be known and designated as Chief of the Pathology Department and shall have status equivalent to that of any other Chief of Services within the hospital and shall be a member of the medical executive committee the same as other department heads with the pathology services to be a division of the hospital staff equal in all respects to other divisions of the hospital.

4. The pathologist shall be an independent contractor and maintain and operate the department of pathology and

the laboratory exclusively under his supervision with the right to make such rules and regulations; to hire and fire personnel necessary for the operation of the laboratory and to decide all matters of policy pertaining to the department of pathology insofar as these provisions do not directly conflict with any hospital laws, by-laws, provisions, or policies.

5. The pathologist or his staff shall provide for continuing professional service.

6. This agreement shall be applicable and continued in force with any associates or assigns of the pathologist and shall be binding upon the successors and assigns of the hospital.

7. This agreement shall be for a term of five (5) years from this date and shall be deemed to be automatically renewed unless terminated in writing by either party at least 180 days prior to the renewal date.

8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist.

9. Any of the matters contained in this agreement may be altered from time to time by the written consent of the parties to this agreement without in any way effecting the remainder of this agreement.

10. This agreement shall supercede and replace any and all previous agreements entered into by and between Theodor E. Bratrud and the hospital.

In Witness Whereof the parties have caused this agreement to be executed at Phoenix on the 25th day of October, 1962.

MARYVALE COMMUNITY HOSPITAL

By .....
President

Attest:

.....
Secretary

By T. E. BRATRUD, M.D.

By T. E. Bratrud, M.D.

Appendix XIX(a)

28 U.S.C. § 1254(1)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

Appendix XIX(b)

11 U.S.C., § 47

§ 47. Jurisdiction of appellate courts

(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

Appendix XIX(c)

11 U.S.C., SECTIONS 511-521

§ 511. Exclusive jurisdiction over debtor and property

Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located.

§ 512. Matters prior to approval of petition; jurisdiction, powers and duties

Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding before adjudication.

§ 513. Same; temporary stay of actions

Prior to the approval of a petition, the judge may upon cause shown grant a temporary stay, until the petition is approved or dismissed, of a prior pending bankruptcy, mortgage foreclosure or equity receivership proceeding and of any act or other proceeding to enforce a lien against a debtor's property, and may upon cause shown enjoin or stay until the petition is approved or dismissed the commencement or continuation of a suit against a debtor.

§ 514. Matters upon approval of petition; jurisdiction, powers, and duties

Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

§ 515. Same; jurisdiction as in insolvency

Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

§ 516. Same; additional jurisdiction over administration of estate

Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—

(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate;

(2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable;

(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; and

(4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the com-

mencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor.

(5) Notwithstanding any other provisions of this chapter, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances, and spare parts (as any of such are defined in the Civil Aeronautics Act of 1938, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any air carrier which is operating pursuant to a certificate of convenience and necessity issued by the Civil Aeronautics Board, and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

(6) Notwithstanding any other provisions of this chapter, the title of any owner, whether as trustee or otherwise, to vessels (as the term is defined in the Ship Mortgage Act, 1920, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any water carrier which holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, and any right of such owner or of any other lessor to such water carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

§ 517. Reference to referee or special master; appointment of receiver

The judge may, at any stage of a proceeding under this chapter, refer the proceeding to a referee in bankruptcy to hear and determine any and all matters not reserved to the judge by the provisions of this chapter, or to a referee as special master, to hear and report generally or upon specified matters. Only under special circumstances shall references be made to a special master who is not a referee. The appointment of a receiver in a proceeding under this chapter shall be by the judge.

§ 518. Repealed. July 7, 1952, c. 579, § 24, 66 Stat. 440

Historical Note

Section, Act July 1, 1898, c. 541, § 118, as added June 22, 1938, c. 575, § 1, 52 Stat. 885, provided for the transfer of proceedings to another district, regardless of the location of the debtor's assets or place of business, if this would best serve the interests of the parties.

Effective Date of Repeal. Repeal of section as effective three months after July 7, 1952, see note under section 1 of this title.

§ 519. Extensions of time

Whenever under this chapter the court is required or permitted to fix a time for any purpose, the court may upon cause shown extend such time.

§ 520. Notices

Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Any notice to be given under this chapter may be combined, whenever feasible, with any other notice or notices to be given under this chapter.

§ 521. Appellate jurisdiction

Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding.

Appendix XIX(d)

11 U.S.C., SEC. 516(1)

§ 516. Same; additional jurisdiction over administration of estate

Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—

(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate.

Appendix XIX(e)

11 U.S.C., SEC. 517

§ 517. Reference to referee or special master; appointment of receiver

The judge may, at any stage of a proceeding under this chapter, refer the proceeding to a referee in bankruptcy to hear and determine any and all matters not reserved to the judge by the provisions of this chapter, or to a referee as special master, to hear and report generally or upon specified matters. Only under special circumstances shall references be made to a special master who is not a referee. The appointment of a receiver in a proceeding under this chapter shall be by the judge.

Appendix XIX(f)

11 U.S.C., SEC. 596

§ 596. Filing and allowing proofs of claims; objections to allowances

After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court.

Appendix XIX(g)

11 U.S.C., SEC. 597

§ 597. Classification of creditors and stockholders

For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock. For the purposes of such classification, the judge shall, if necessary, upon the application of the trustee, the debtor, any creditor, or an indenture trustee, fix a hearing upon notice to the holders of secured claims, the debtor, the trustee, and such other persons as the judge may designate, to determine summarily the value of the security and classify as unsecured the amount in excess of such value.

Appendix XIX(h)

11 U.S.C., SEC. 602

§ 602. Rejection of executory contract or unexpired lease; assignment of future rent claim

In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor. The claim of the landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be provable, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by such lease for the three years next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid accrued rent, without acceleration, up to such date of surrender or reentry: *Provided,* That the court shall scrutinize the circumstances of an assignment of a future rent claim and the amount of the consideration paid for such assignment in determining the amount of damages allowed the assignee thereof.

Appendix XIX(i)

F.R.C.P., Rule 53(a)(2)

Rule 53 RULES OF CIVIL PROCEDURE

(e) Report.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Appendix XIX(j)

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 19. Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

[Cross-reference: § 1254(1), also (2) (certiorari to courts of appeals); § 1255(1) (certiorari to Court of Claims);

§ 1256 (certiorari to Court of Customs and Patent Appeals); § 1257(3) (certiorari to state courts); § 1258(3) (certiorari to Supreme Court of Puerto Rico); § 2101 (time for appeal or certiorari; docketing; stay; and see Rule 22, *infra*); § 2103 (appeal from state court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari).

Appendix XIX(k)

Rule 23. The Petition for Certiorari.

1. The petition for writ of certiorari shall contain in the order here indicated—

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

Appendix XIX(k)

Rule 23. The Petition for Certiorari.

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(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.